In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 512

UNITED STATES OF AMERICA, APPELLANT

v.

THE CHEMICAL FOUNDATION, INCORPORATED, Appellee

BRIEF ON BEHALF OF APPELLANT, UNITED STATES OF AMERICA

The voluminous record in this case results from the action of the District Court in refusing to hear the case on defendant's motion to dismiss the bill and plaintiff's motion to strike out portions of the Answer (Rec. Vol. 2, pp. 593 and 594) and directing all statements and arguments of counsel to be made part of the record (Rec. Vol. 2, p. 946). In the view of the Government the case is controlled by fundamental principles of law which could have been decided upon the pleadings and these motions.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court below is reported in 294 Fed. 300, and is found in the Record, Vol. 7, at pp. 4910–4967.

The opinion of the Circuit Court of Appeals is reported in 5 Fed. (2d) 191, and is found in the Record, Vol. 7, at pp. 4985–5047.

PROCEEDINGS IN COURTS BELOW

This is a suit in equity, instituted by the United States of America, through the Attorney General, by direction of the President, against The Chemical Foundation, Incorporated, a Delaware corporation. The object of the suit is to have declared null and void and to set aside certain alleged sales, assignments, and transfers of patents, copyrights, trade-marks, and other similar rights claimed to have been sold and assigned to the appellee by the Alien Property Custodian evidenced by twenty-one instruments of assignment, the first of which is dated April 10, 1919, and the last November 5, 1921; to require the appellee to reconvey said properties and rights to the United States, and to account to the United States for the income and revenues derived therefrom during the period of possession by the appellee.

The bill was filed in the United States District Court for the District of Delaware on the 8th day of September, 1922. The appellee duly appeared, and, thereafter, on the 27th day of October, 1922, filed its answer. The answer contains certain alleged affirmative defenses to the bill, which may be briefly summarized as follows: (1) A motion to dismiss the bill for want of equity (Par. XXXIX, answer; Rec. Vol. 1, p. 528); (2) alleged laches

and acquiescence on the part of the Government (Pars. XL and XLI, Answer; Rec. Vol. 1, pp. 528 and 530); (3) an effort to justify the alleged sales on the grounds that the same were made with good motives and in good faith, and for the purpose of promoting the interests of the dye and chemical industry of the United States (Pars. XLII to LVIII, Answer; Rec. Vol. 1, pp. 530 to 545).

On the 3d day of May, 1923, the appellant filed a motion to strike out certain portions of the answer, including that part thereof which undertakes to set up a third separate and affirmative defense, upon the ground that the averments therein contained do not constitute a valid defense to the cause of action set up in the bill of complaint. (Rec. Vol. 1, p. 501.) On the same day it moved the court to set the case for hearing on the motions to dismiss the bill and strike out portions of the answer. On objection by appellee this application was denied and the case went to trial without any hearing on the motions to dismiss. After trial and argument, the District Court held that the Government was not entitled to the relief sought for reasons stated in its opinion. (Rec. Vol. 7, p. 4910–4967.) An order was thereupon entered dismissing the bill and decreeing cost against the Government. (Rec. Vol. 7, p. 4968.) From this order an appeal was taken to the Circuit Court of Appeals for the Third Circuit (Rec. Vol. 7, pp. 4969 to 4983), which affirmed the de-

cision of the District Court (Rec. Vol. 7, pp. 4985 to 5047). From that decree of affirmance the case was appealed to this Court. (Rec. Vol. 7, pp. 5048 to 5063.)

JURISDICTION

The decree of the Circuit Court of Appeals was entered on March 26, 1925. (Rec. Vol. 7, p. 5045.) An appeal was taken to this Court under the provisions of Section 241, Judicial Code.

Appellant, out of an abundance of caution, in June, 1925, petitioned this Court for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit under the provisions of Section 240 (a), Judicial Code, and asked that such petition for Writ of Certiorari be held in abeyance pending the determination by this Court of this appeal.

PRINCIPAL ISSUES STATED

The principal issues raised by the assignments of error may be briefly summarized as follows:

I

The court erred in its construction of the Trading with the Enemy Act, and especially the provisions of Section 12 thereof conferring upon the Custodian power of sale of Enemy Property in his custody pending final disposition thereof by Congress; and in holding that the Act authorized the Executive Officers of the Government to confiscate Enemy Property when they deemed such confiscation in the public interest. (Assignments of Error I, II, and IX. Rec. vol. 7, pp. 5048–5050 and 5053–5054)

The Government contends that the power of sale and disposition of Enemy Property given to the Alien Property Custodian by the Trading

with the Enemy Act was a power given to a public officer in trust, to be exercised in accordance with and subject to the limitations of the statutes and principles of law applicable to such powers when granted to a public officer or fiduciary. The Court below held that this statute gave to the executive officers of the Government charged with the duties prescribed therein "unlimited power" to dispose of this property as the absolute owners thereof and to effect a confiscation thereof if and when they determined such confiscation to be in the public interests. It is further contended by the Government that the construction given by the Courts below would render the statute unconstitutional.

II

The Court erred in holding that the provisions of Section 41 of the Criminal Code of the United States and the principles of law and equity forbidding sales by public officers or fiduciaries of property in their custody, to themselves or to corporations of which they are officers, had no application to this case. (Assignments of Error III and IV and part of VII. Rec. vol. 7, pp. 5050–5051 and 5052–5053.)

The Government contends that the transactions in question, being sales by a public officer of property placed and held in his possession under the law for the benefit of others, to himself or to a corporation of which he and his associates were executive officers, were in direct violation of Section 41 of the Criminal Code, and of the rules of law and principles of equity applicable to such sales when made by public officers or fiduciaries,

and were therefore void. The District Court held that the Trading with the Enemy Act was the "supreme law" as to the disposition of Enemy Property, and gave to the executive officers acting thereunder "unlimited power" with respect to such sales or disposition; that neither the general statutes of the United States nor rules of law nor principles of equity generally applicable to such transactions had any application to this case or imposed any restraints upon such officers or upon their acts. The appellate court concurred in this view, but based its decision upon the further ground that in order to constitute a violation of the provisions of Section 41 of the Criminal Code, the Government officer or agent making the sale to himself or a corporation of which he was the officer must have directly or indirectly a beneficial interest in the pecuniary profits or contracts of such corporation.

III

The court erred in holding that there was any lawful authority to make private sales of these properties to the appellee. (Assignments of Error V and VI. Rec. vol. 7, pp. 5051–5052)

The Government contends that the Alien Property Custodian had no power to make a private sale of Enemy Property unless and until authorized by the President in the manner prescribed in the Act; that the sales which are the subject of this litigation were not so authorized and were void. The court held that the alleged orders under which it was claimed the Alien Property Custodian acted were adequate, and

that private sales were lawfully authorized thereby.

IV

The court erred in holding that the sales were valid since even if lawfully authorized, they were irregular in many particulars, and especially in that there was no effort to arrive at the value of the property, the price was nominal and arbitrarily fixed and was grossly inadequate, and that the procedure did not comply with the terms and intent of the Act, or of the alleged Executive orders under which they were made. (Assignments of Error VII and VIII. Rec. vol. 7, pp. 5052–5053)

The Government contends that even conceding there was authority to make the sales, they were irregularly conducted for the reasons stated, among others, and that they were void under the provisions of the Act and recognized principles of law and equity. The Court held that under the Trading with the Enemy Act the Custodian was given unlimited power to make sales of this property as the absolute owner; that he could make such sales under conditions which in effect constituted a devotion thereof to the public interests and destroyed the monetary value of the property; or could confiscate the property and in effect donate the same where he regarded such transactions in the public interests.

V

The court erred in not holding that these transactions were made in pursuance of and in the accomplishment of an unlawful scheme or conspiracy. (Assignment of Error X. Rec. vol. 7, p. 5054)

The Government contends that these transactions were induced, brought about, and accom-

plished in pursuance of a scheme or conspiracy to do or cause to be done a lawful act in an unlawful manner and for an unlawful purpose. Both courts below held that this conspiracy was not established for reasons which will be hereinafter considered.

VI

The Court erred in ordering the taxation of costs of the cause against the United States. (Assignment of Error XVIII. Rec. vol. 7. p. 5056)

The Government contends that the costs of the suit can not be taxed against the United States. Both Courts below ordered that the costs be taxed against the United States.

STATEMENT OF CASE

In order that the pertinency of the facts to be stated may be appreciated, it is deemed desirable first to state briefly the status of the law at the time of the acts under review.

A state of war with Germany was declared on April 6, 1917. The Trading with the Enemy Act was approved October 6, 1917. (40 Stats. 411.) The general purpose of this Act was to define the status of "enemies and allies of enemies" and to regulate intercourse and transactions with persons occupying this status during the existence of war, and as an incident of such regulation to provide for the treatment of enemy property within the jurisdiction of the United States outside of the area of military operations.

The term "enemy or ally of an enemy" as defined in this Act related rather to the actual than the international status of the person, the enemy status being determined by the "residence" of the person involved. German citizens in the United States were not deemed enemies unless expressly so declared by Presidential Proclamation, and a large proportion of the Germans residing in this country never became enemies, nor was their property subject to seizure. On the other hand, American citizens, or citizens of Allied Countries residing in Germany or occupied territory acquired the status of enemies, and their property in the United States became subject to seizure. The reasons for this arbitrary classification are obvious.

The classes of persons who were subject to its provisions as "enemies or allies of enemies" having thus been defined, the sections of the Act most pertinent to this inquiry provide for—

(1) The seizure by the President of property of such "enemies or allies of enemies." (Sec. 7.) This power might be exercised through such officer as the President might select, and was in fact exercised through the Alien Property Custodian.

(2) The holding and management of the property so seized by the Alien Property Custodian, with the powers of "a common-law trustee," and with power to make sales to prevent waste. (Sec. 12.)

(3) The final disposition of the property by Congress. (Sec. 12.)

(4) The proceedings for seizure being summary, giving absolute right to possession whether the owner was "an enemy" as defined in the Act or not, it was provided by Section 9 that in event of an error being made the owner might apply to the President for return of his property, and if refused seek relief by suit in the Courts of the United States.

This was the very simple scheme prescribed by Congress for the seizure, handling, and disposition of enemy property, and was in entire accord with modern practice of civilized nations. The Act was clearly one of conservation of enemy property under the strictest principles of trust. This is admitted by all counsel, and was so decided by both courts. (Rec. Vol. 7, pp. 4998, 4999, 5018.)

Honorable A. Mitchell Palmer was appointed Custodian. On November 14, 1917, he issued an official statement approved by the President, in which he stated that his function was that of a trustee or conservator to administer and care for the property while the disability exists; that there was, of course, no thought of the confiscation or dissipation of the property thus held in trust. (Rec. Vol. 4, pp. 2533 and 2534.) We thus have a starting point at which all parties are in agreement.

The President designated the Custodian as the officer through whom the power of seizure should

be exercised. (P. Ex. 1, Rec. Vol. 8, pp. 10 and 11.) These seizures soon placed in the hands of the Custodian large amounts of property owned or partially owned by enemies or allies of enemies as defined by the Act, including many manufacturing and other plants engaged in the production of materials which were needed for the purposes of war or the commercial use of the country. They were operated by the Custodian under war conditions at considerable profit. (See testimony of Mr. Palmer, Rec. Vol. 4, p. 2536.)

In these circumstances, after conference with the President, Mr. Palmer presented to Congress an amendment to Section 12 of the Act enlarging the power of sale. (Rec. Vol. 4, pp. 2538 and 2539.) It will be recalled that Section 12 of the original Act only authorized sale of this particular property in order to prevent waste—in other words, as a matter of protection or conservation. The amendment now proposed was to give to the Custodian, acting under direction of the President, the power to sell enemy property in his discretion, in order to convert such property into cash to be placed in the Treasury of the United States in lieu of the property. The effect of such transaction would be to place these active properties which were supplying the military or commercial needs of the country in private American ownership; to substitute therefor in the hands of the Government the fair equivalent in cash, and to hold this equivalent for final disposition by Con-

gress as provided in the Act. The enemy would then receive, if and when Congress returned the property, that which had been taken from him or its equivalent, and could not justly complain, while the people of the United States would have the use of the property and the profits accruing therefrom as the result of war conditions. The purpose of the amendment was clearly stated by Mr. Palmer himself in the hearing before the Subcommittee on Judiciary of the Senate on July 27, 1922, on Senate Bill 3852, as follows:

> The intention simply was to convert it into money and to hold that money for all the purposes for which the original property was to be held under the Trading with the Enemy Act.

This was the view taken by Congress, as clearly shown in the statements of the leaders of that body at the time the amendment was under consideration (pp. 3, 5, 6, and 16, Hearings on H. R. 9867 before Senate Committee on Appropriations, 65th Cong., 2d sess.; Cong. Rec., Vol. 56, part 4, pp. 3262, 3263, 3316, 3317, 3319, 3322, 3328, 3942, 3944, 4003, 4083).

The amendment as enacted and approved March 28, 1918 (40 Stat. 459), provided in effect that the Custodian should in respect of all property other than money coming into his possession be vested with all the powers of a common-law trustee, and in addition thereto, acting under the direction of the President, should have the power to manage

the property and to do any act or thing in respect thereof or disposition thereof by sale or otherwise, as though he were the absolute owner. It was provided, however, that all sales other than those to the United States should be made at public auction and subject to certain other conditions therein stated, unless the President, stating his reasons therefor in the public interests, should otherwise determine. The power of final disposition of the property or the beneficial interest therein represented by the purchase price, was retained by Congress as in the original act.

The basic question in this case is the proper construction of this Act and the powers conferred thereby. The Government contends that the powers given were those of an ordinary trustee with full power of sale similar to the powers daily conferred by deeds and wills in the United States. The appellee contends and the courts below held that this amendment conferred "unlimited power" upon the Custodian acting under direction of the President to dispose of the property in any way he saw fit, even to the extent of confiscating the same and transferring it to private industry for a nominal consideration. These positions will be discussed later.

Acting under authority of this amendment, the Custodian created an elaborate sales organization and began to make sales of enemy property under his control. Full provision was made for ascertainment of the value of such properties by ac-

counting and appraisement, and they were then offered at public auction. The sales were to be approved not only by the Custodian but by a Sales Committee created for that purpose, consisting of five men. (P. Ex. 3, Rec. Vol. 8, pp. 14 and 15.)

From time to time private sales of property were authorized by Executive Order of the President, stating the reasons therefor, these sales consisting chiefly of small amounts of goods or merchandise located on piers needed for military purposes, or at other points, where a public auction could not be judiciously held or a public sale was inexpedient. (For example, see P. Exs. 693, 694, 695, 696, 697, 698, Rec. Vol. 10, pp. 1791, to 1800.)

In making sales under this amendment three difficulties arose:

(1) The question was presented as to title which the Custodian could convey. It had been held under the Civil War Acts that a conveyance by a custodian or Government officer in making sale of property so seized, like a sheriff's sale, only carried the title which he had acquired. If, therefore, it subsequently developed that the property had been wrongfully seized and was not in fact enemy property, while the Custodian acquired possession, he did not acquire title, and the title which he would thus convey would be defective. (P. Ex. 10, Rec. Vol. 8, p. 56.)

(2) Where the control of the property was through shares of stock which had been seized as enemy owned, and it was desired to sell these shares of stock, it was found that there were certificates outstanding held abroad and the corporations refused to issue new certificates to the grantee of the Custodian without surrender of the old certificates unless protected by law. (P. Ex. 10, Rec. Vol. 8, pp. 56 and 57.)

(3) It was found that in many of these manufacturing plants German-owned patents were used, the use of which was deemed essential to the successful conduct of the plant. The original Act had not provided for the seizure of enemy-owned patents and similar rights, but had provided for licensing the same by the President, which power was being exercised by the Federal Trade Commission. It was deemed desirable by the Custodian that patents in use by manufacturing plants which he desired to sell should be seized and sold with the plants, thus giving to the owner the complete right to use the same. (P. Ex. 10, Rec. Vol. 8, pp. 56 and 57.)

To meet these conditions, an amendment was proposed and was enacted to Section 7–c of the Act on November 4, 1918, a few days before the Armistice. (40 Stat. 1020.)

This amendment in effect authorized the President to seize enemy-owned patents and other similar rights, with power in the Custodian to hold and dispose of any patents so seized in like man-

ner as other property. It required corporations to issue new certificates for shares of stock seized by the Custodian without the return of the old certificates, and protected them against liability for such action. It transferred the interest or claim of any person in and to property sold by the Custodian to the proceeds derived from such sale in the hands of the United States. This last clause gave to the owner of the property, whether an enemy or nonenemy, the right to claim against the proceeds instead of against the original property. If, as was clearly contemplated, the proceeds should be the fair equivalent of the property no real harm was done even to an American citizen or nonenemy whose property was erroneously seized. It thus enabled the Custodian to give good and complete title to the property sold.

The purpose of this amendment is clearly stated by Lee C. Bradley, General Counsel to the Alien Property Custodian, in a hearing before the Committee on Appropriations, Sixty-fifth Congress, second session, H. R. 13086, pp. 81 to 88. (Rec. Vol. I, pp. 75 to 90) to which the Court is referred.

This was the state of the law and the status of affairs when the Armistice was signed on November 11, 1918.

We have observed that the Trading with the Enemy Act as originally passed did not authorize the seizure of enemy-owned patents, copyrights, and similar property rights. Section 10 of the statute contained elaborate provisions for the pro-

tection of these rights and authorized the President to grant licenses for the use of such patents and other rights to American citizens during the War, a tentative license fee to be fixed by the Federal Trade Commission issuing the license and paid by the licensee to the Alien Property Custodian and by him deposited in the Treasury of the United States. A final reasonable royalty for the use of such patent to be determined by the courts upon a suit provided for in the Act by the owner of such patent within a year after the end of the war, such tentative license fee as well as judgment for the value of the use thereof to be disposed of as provided in the Act.

This power the President exercised through the Federal Trade Commission. (P. Ex. 1, Rec. Vol. 8, pp. 7 and 8.) Under this arrangement a considerable number of the more important patents, chiefly relating to dyes and chemicals and now involved in this case, had been licensed by the Trade Commission to American manufacturers and were in active and successful use. (P. Exs. 216 to 275, Rec. Vol. 8, pp. 515 to 599; P. Exs. 276 to 335, Rec. Vol. 8, pp. 605 to 682; P. Exs. 401, 401A, 401B, Rec. Vol. 8, pp. 703 to 717.) There seems to have developed between the Custodian and the Trade Commission some difference of opinion, if not as to the Act itself at least to the administration thereof. The Commission favored the continuance of the system of licensing enemy-owned patents, while the Custodian

desired to make seizures under the amendment. The matter was apparently taken to the President and an arrangement was reached by which the Custodian should limit his seizures to those patents intimately connected with or necessary to companies in which the Custodian held a predominant stock interest or which were connected with and important to companies in which the Custodian had an actual interest through stock ownership or otherwise. All other patents were to remain under the jurisdiction of the Federal Trade Commission and not subject to demand by the Custodian. This arrangement was embodied in a memorandum by Mr. Palmer dated January 13, 1919. (Rec. Vol. 9, pp. 859–860.) (See Testimony of Mr. Palmer, Rec. Vol. 4, pp. 2564 et seq.; memorandum by Mr. Palmer of January 13, 1919, embodying this agreement, P. Ex. 453, Rec. Vol. 9, pp. 859 and 860; letter from Mr. Hoguet, Patent Counsel to Mr. Palmer, dated January 15, 1919, P. Ex. 49, Rec. Vol. 8, pp. 149 to 155; Executive Order of December 3, 1918, Vol. 1, p. 547.)

The President left for Paris to attend the Peace Conference on December 4, 1918. (P. Ex. 106, Rec. Vol. 8, p. 297.) Before his departure Mr. Palmer prepared and presented to him an Executive Order distributing the duties under the amendment of November 4, 1918, to Section 7–c of the Act, as between the Custodian and the Commission, which substantially confirmed the arrange-

ment above recited. This order was signed on December 3, 1918. (Rec. Vol. 1, p. 547.)

By Section V of that order the President undertook to vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12 of the Act as amended, subject to the limitations therein stated, which included the power to authorize private sales of property, "stating the reasons therefor in the public interests." The Government insists that this order was invalid and conferred no authority upon Mr. Polk, since the power vested in the President by Section 12 as amended involved an exercise of discretion personal to himself and could not be vested in another person. This subject will be discussed later.

It appears, therefore, that as late as January 13, 1919, when the Memorandum filed by Mr. Palmer with respect to the seizure of patents was made (P. Ex. 453, Rec. Vol. 9, pp. 859 and 860), the situation was substantially as follows:

(1) The President was in Paris negotiating peace.

(2) The Trading with the Enemy Act had been amended on November 4, 1918, to authorize seizure of patent rights, copyrights, and similar rights by the President.

(3) Section 12 of the Act as amended authorized sale of property by the Custodian as already stated.

(4) The President had by Executive Order of December 3, 1918, authorized the exercise of the power of seizure of patents through the Custodian, had continued in full force and effect the power of the Federal Trade Commission to license all patents not seized, and had undertaken to vest in Mr. Polk the power, vested by the Act in the President, to authorize private sales of this property by the Custodian when he should determine it to be in the public interests to make such private sales instead of public sales, and to state the reasons therefor.

(5) An arrangement had been made between the Federal Trade Commission and the Custodian, apparently with the approval of the President, for the administration of the Act with respect to the seizure of patents, whereby seizures would be limited to those patents related to or necessary to business or industries in which the Custodian had a control or an interest, and that all other patents were to be continued as before and licensed by the Federal Trade Commission as directed by the Order of the President.

In the organization of his staff the Alien Property Custodian had appointed Francis P. Garvan, Esquire, Chief of the Bureau of Investigation, Joseph H. Choate, Jr., Esquire, serving under Mr. Garvan, in charge of investigation of enemy interest in the chemical and dye industry, and Ramsey Hoguet, Esquire, Patent Counsel. These

officers have an important part in the events now to be recited.

At the beginning of the War the dye and chemical industries in the United States were comparatively small. (D. Ex. 30, Rec. Vol. 11, pp. 2098, 2141.) A large proportion of the most important dyes used by the textile industry, and of the more necessary chemicals and medicines, were imported from Germany or manufactured under German patents. (Rec. Vol. 1, p. 506; D. Ex. 30, Rec. Vol. 11, p. 2098 at 2142 and 2143.) This situation had been the source of some embarrassment to these American industries during the earlier period of the War owing to the difficulties of importation resulting from the existence of blockades. (Rec. Vol. 1, p. 506; D. Ex. 30, Rec. Vol. 11, p. 2098 at 2147.) As a result of these conditions the dye and chemical industry of the United States had developed very rapidly. When the United States entered the war all importations from Germany ceased, but the German patents covering many of the more important dyes and chemicals were made available to American industry under the licensing system through the Federal Trade Commission as provided by Section 10 of the Trading with the Enemy Act. As a consequence the dye and chemical industry of the United States had by March, 1919, developed to a point that it could supply great quantities of dyes, chemicals, and medicinals required in the

United States, of a quality quite equal to those formerly imported from Germany. (D. Exs. 47 and 47a, Rec. Vol. 11, pp. 2314 et seq.; D. Ex. 130, Rec. Vol. 12, pp. 2726 to 2730.)

In connection with the development of this business there had been organized two Trade Associations, known as the American Dye Stuffs Manufacturers Association and the American Dyes Institute, and there also existed several Chemical Associations of similar character. The two organizations of dye manufacturers mentioned were consolidated early in 1918 into the American Dyes Institute (P. Ex. 53, Rec. Vol. 8, p. 158 at 169), which was an unincorporated trade association, including in its membership concerns which manufactured at least 90% of the dye stuffs produced in the United States (P. Ex. 28, Rec. Vol. 8, p. 85 at 87).

These industries were naturally concerned as to the effect of the restoration of peace between the United States and Germany with the resumption of importations, especially if the German patents in the United States were restored to the owners. This uneasiness was increased by the signing of the Armistice and the peace negotiations then pending.

As early as August, 1918, a joint committee of the Chemical Alliance, the American Dye Stuff Manufacturers Association, and the American Dyes Institute had been appointed to appear before the War Industries Board and urge the importance of

the protection of these industries. (P. Ex. 511, Rec. Vol. 9, p. 1011.) Between that time and January, 1919, conferences were held between Mr. Garvan and his associates named, representing the Alien Property Custodian, and the representatives of these industries, looking to the development of some plan by which the German dye and chemical patents which had not then been seized might be acquired by the representatives of the dye and chemical industry through seizure and sale by the Alien Property Custodian. (Rec. Vol. 4, pp. 2601, 2603.) In the letter from Mr. Hoguet, Patent Counsel for the Alien Property Custodian, to Mr. Palmer, dated January 15, 1919 (P. Ex. 49, Rec. Vol. 8, pp. 149 to 155), in which he refers to the agreement with the Trade Commission embodied in the memorandum of Mr. Palmer of January 13, 1919 (P. Ex. 453, Rec. Vol. 9, pp. 859 and 860), and the attitude of the President with respect to seizure of patents, he makes reference to these conferences and the desire of the representatives of the industry to acquire and control these patents.

In a postscript to this letter he states that he had a conference with a representative of the Dupont Company, the largest dye manufacturer in the country, and that the representatives of the American Dyes Institute would "make a request to the Custodian that he take and sell the German-owned American patents on the ground that

proper protection was not afforded by Federal Trade Commission licenses." (P. Ex. 49, Rec. Vol. 9, p. 149 at 155.) This is the first definite statement of the plan which subsequently developed into the transactions which are the subject of this suit.

It should be observed that the attitude of the Custodian and the members of his staff toward the property seized and held by him under the Trading with the Enemy Act had undergone a profound change since his original declaration that the Act was one of conservation of enemy property to be held in trust, and that there was no thought of confiscation or dissipation of such property. (See testimony of Mr. Palmer, Rec. Vol. 4, pp. 2533 to 2539, 2474 to 2681, and the Report of Mr. Palmer as Custodian, D. Ex. 30, Rec. Vol. 11, pp. 2179 and 2180.) The Custodian and the members of his staff and the representatives of the industry were therefore in accord in seeking to devise some plan whereby the Custodian might seize these patents and make them available to the American industries concerned after the War.

Mr. Palmer states that he referred to Mr. Garvan the matter of working out some plan to this end. (Rec. Vol 4, pp. 2599 and 2600.) Mr. Choate and Mr. Houget were associated with Mr. Garvan in these negotiations. (Rec. Vol. 4, pp. 2600 and 2601.) The dye and chemical industries were represented by a committee of the Dyes Institute and by counsel of some of the larger manufac-

turers. These parties or some of them conferred informally in New York, which resulted in the arrangement of a conference at the office of the Custodian in Washington on January 27, 1919, of which minutes were kept and are now a part of this record. (P. Ex. 28, Rec. Vol. 8, pp. 85 to 109.)

Neither Mr. Palmer nor Mr. Garvan were present at this conference. The Custodian was represented by Mr. Choate, Mr. Hoguet, and several other members of the staff. The dye and chemical interests were represented by a committee of the Dyes Institute and several counsel of the leading manufacturers. (P. Ex. 28, Rec. Vol. 8, p. 85.) None of the patents involved had then been seized. A number of the more important patents were being used extensively under licenses from the Federal Trade Commission.

The stated purpose of this conference was to devise some plan for the sale of all enemy-owned dye and chemical patents—none of which had been seized—to the dye and chemical interests of the United States or a corporation to be organized by them. (P. Ex. 28, Rec. Vol. 8, pp. 85 and 86.) It was suggested that the sale should be public, but the representatives of the industries insisted upon a private sale. (P. Ex. 28, Rec. Vol. 8, pp. 88 and 89.) The number of patents of the classes named was not known, but the probable number was discussed and estimated at from 1,000 to 3,000. (P. Ex. 28, Rec. Vol. 8, pp.

96 and 97.) Mention was incidentally made as to the price which might be paid, and it was suggested that since the average cost of securing a patent from the Patent Office was about $50 each, the price should be fixed on this basis. (P. Ex. 28, Rec. Vol. 8, pp. 96 and 97.) No decision was reached on this point (P. Ex. 28, Rec. Vol. 8, pp. 98 and 99), but it is interesting to observe that 6,475 patents, applications, trade-marks, copyrights, and contracts were subsequently transferred at an average price of $41.98 each, which was less than the estimated cost of obtaining a patent, allowing nothing for the property value thereof. As stated, at that time a number of these patents were in use under nonexclusive licenses issued by the Federal Trade Commission or under contracts held by the Custodian, and were then yielding a revenue at the rate of approximately $300,000 per annum (P. Exs. 198 and 198a, Rec. Vol. 8, pp. 473 to 477), which amount was being paid to the Custodian and by him into the Treasury of the United States as required by the Trading with the Enemy Act, to await final disposition as provided by that Act.

It seems to have been the conclusion of this conference to proceed with the development of the plan for the sale of these patents along the general lines discussed, although no definite agreement was reached as to any point. While Mr. Palmer does not appear in these transactions, he testifies that he was in touch with the situation through Mr.

Garvan and approved of these plans. (Rec. Vol. 4, pp. 2603 and 2604.) The matter remained in the hands of Mr. Garvan, Mr. Choate, and Mr. Hoguet. On the next day Mr. Hoguet reported to Mr. Palmer that the representatives of the dye industry had remained over another day to see him and having failed to do so would "submit their recommendations in brief form in a few days." (P. Ex. 35, Rec. Vol. 8, p. 136.)

The representatives of the Dyes Institute, not having seen Mr. Palmer, returned to New York, held a meeting of the executive committee of that Institute, at which the matter was fully reported and approved. The Dyes Institute adopted resolutions to the effect that they would finance the expense of the transaction, including the seizure of patents, and take steps to finance the proposed purchasing corporation. (P. Ex. 29, Rec. Vol. 8, p. 110 at 114.) The matter then stood substantially as follows:

(1) The development of a plan and the conduct of the negotiations to that end on behalf of the Custodian were in the hands of Mr. Garvan, who became president of the proposed purchasing corporation.

(2) The organization of a proposed purchasing corporation was in the hands of Mr. Choate, chief of the chemical division, bureau of investigation of the Custodian, who became general counsel of the purchasing corporation.

(3) The matter of seizure and transfer of patents was in the hands of Mr. Hoguet, patent counsel of the Custodian, who became patent counsel of the proposed purchasing corporation.

(4) The matter of financing the proposed purchasing corporation was in the hands of the committee of the Dyes Institute, representing the dye and chemical industries, who subsequently owned all of the stock of the corporation.

It was immediately arranged that two patent counsel representing the Du Pont Company and the National Aniline Company, two of the largest dye manufacturers in the country, should be placed in the Patent Office to list all patents which it was desired should be seized by the Custodian and transferred to or for the benefit of the dye and chemical industry. (P. Ex. 29, Rec. Vol. 8, p. 110 at 113; P. Ex. 33, Rec. Vol. 8, p. 131.) Mr. Gordon, a patent attorney on the staff of the Custodian under Mr. Hoguet, was assigned to duty to abstract the title to all patents so listed by counsel for these manufacturers acting on behalf of the Dyes Institute. (Rec. Vol. 2, pp. 1054 and 1055.) After the patents were abstracted Mr. Gordon prepared demands to be made upon the Commissioner of Patents by the Custodian which constituted the act of seizure. (Rec. Vol. 2, p. 1055.) These demands were then initialed by Mr. Hoguet, signed by the Custodian, and served upon the Commissioner of Patents, which action perfected the seizure and brought the patent rights into the

possession of and under the control of the Custodian. (Rec. Vol. 2, p. 1068.) The number of patents which the dye and chemical interests desired to acquire proved to be greater than was estimated. The number finally seized and conveyed was 4,764, exclusive of applications, contracts, copyrights, etc., which brought the total number of properties seized and transferred up to 6,475. These proceedings required some time and none of the patents were in fact seized by the Custodian until the 3rd day of February, 1919, when actual seizure was taken of a small number thereof. (Ex. G to Bill of Complaint, Rec. Vol. 1, pp. 124 to 403.) Practically all other seizures were made by Mr. Garvan, after he succeeded Mr. Palmer as Custodian on March 4, 1919, and who was also at the time of such seizures president of the purchasing corporation.

While these proceedings were being taken for the seizure of patents under the direction of Mr. Hoguet, Mr. Garvan and Mr. Choate were busy in the development of the plan looking to the transfer of the patents to a corporation representing the dye and chemical industries and the organization of that corporation. A number of conferences were held between them and the representatives of the Dyes Institute as disclosed by the records of that Institute and contemporaneous correspondence, as well as the testimony in this case. (P. Ex. 449, Rec. Vol. 9, p. 855; P. Ex. 33, Rec. Vol. 8, p. 123 at 126 and 127; P.

Ex. 528, Rec. Vol. 9, p. 1127 at 1132 and 1133; P. Ex. 32, Rec. Vol. 8, p. 122; P. Ex. 533, Rec. Vol. 9, pp. 1149 and 1150; P. Ex. 534, Rec. Vol. 9, p. 1151 at 1154; P. Ex. 535, Rec. Vol. 9, p. 1157 at 1160; P. Ex. 538, Rec. Vol. 9, p. 1182 at 1183; Ex. B. to Bill of Complaint, Rec. Vol. 1, p. 90.)

On February 14, 1919, Mr. Garvan appeared before the Advisory Committee on Sales of the Alien Property Custodian, consisting of Mr. Bannard, Mr. Ingraham, Mr. Dodge, Mr. Griswold, and Mr. Stone. (P. Ex. 115, Rec. Vol. 8, p. 316 at 318.) As we have seen, this Committee was created for the purpose of passing on all sales of alien property. (P. Ex. 3, Rec. Vol. 8, pp. 14, 15, and 16.) The minutes of the Committee (P. Ex. 115, Rec. Vol. 8, p. 318) show that Mr. Garvan proposed a "plan in reference to a sale of enemy-owned patents covering certain chemicals and dyes, etc., to a corporation or association to be formed, the new corporation to license the patents to the American trade; after consideration, this committee approves the plan as a general proposition." This was done before the details of the plan had been developed; before any price had been fixed, as shown by Mr. Garvan's testimony (Rec. Vol. 4, pp. 2799 to 2803); before the number of patents was known; before the patents had been seized; before it was known who were the officers of the corporation; before any authority to make private sale had been obtained from the President or from Mr. Polk, to whom the

President had undertaken to delegate that authority.

Mr. Garvan testifies that at the same time he arranged for the members of the Advisory Sales Committee to become voting trustees of the stock of the proposed corporation if and when formed. (Rec. Vol. 5, p. 3001.) The matter was never again submitted to this Committee as such and the Committee never passed upon the terms of sale, the price to be paid, or any of the details of the plan.

Mr. Garvan states that about February 15th or 16th, 1919, he, Mr. Choate, and Mr. Hoguet held a conference in New York at the office of the Custodian with representatives of the dye and chemical industries, at which additional details of the plan were worked out, and a price for all the patents to be sold, the number of which was unknown, and few of which had been seized, was fixed at $250,000. This price had no reference to their value, but was arrived at because this was all the money that the industry felt like raising for the purchase of these patents. (Rec. Vol. 4, pp. 2799, 2800, 2801; Rec. Vol. 5, p. 2986.) This was not an unnatural position on their part if the Custodian would agree to their terms.

He also states that about this time he agreed to become president of the corporation. (Rec. Vol. 5, pp. 2952, 3011.) The charter of the corporation was filed in Delaware on February 19, 1919, but no organization meeting was held until March 8, 1919, after Mr. Garvan became Custodian.

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(Rec. Vol. 1, p. 90; P. Ex. 57, Rec. Vol. 8, p. 178.) The organization of the corporation was under the direction of Mr. Choate, who became its General Counsel, and was paid a fee of $10,000 for his services in that regard. (P. Ex. 57, Rec. Vol. 8, p. 178 at 182; P. Ex. 647, Rec. Vol. 10, p. 1560.)

The corporation thus organized was an ordinary business corporation under the laws of Delaware, with the broadest powers of a holding company, and the power to acquire and dispose of property of any kind. (See charter, Rec. Vol. 1, pp. 90–97.) The nonvoting preferred stock of a par value equal to the amount of money put in was distributed among the members of the industry, the subscribers to the plan. The voting common stock was put into a voting trust, of which the members of the Advisory Sales Committee were trustees, and voting trust certificates issued to subscribers to the plan entitled to the stock. (Rec. Vol. 1, p. 110; p. 107.)

Only a few patents had yet been seized. Mr. Palmer had not appeared in the transactions, but testified that he was kept advised of what was going on. (Rec. Vol. 4, pp. 2603 and 2604.) The counsel representing the dye manufacturers named who had been placed in the Patent Office to list the patents, and the patent attorney on the staff of the Custodian placed there to abstract the patents so listed and prepare demands were working at night and on Sundays to complete their work and effect the seizures. (Rec. Vol. 2, p. 1070.) Mr.

Gordon, the patent attorney, testified that he was urged by Mr. Hoguet to complete the work promptly, in order that the matter might be presented to the President when he returned as a completed matter, because "rather than ask permission to do a certain thing, if we could show that the thing had already been done, there would be more likelihood of its being approved." (Rec. Vol. 2, pp. 1070 and 1071.)

Up to this time great care had been exercised not to let the Federal Trade Commission, authorized by the President to handle and license these patents, know of the proposed transaction. (Rec. Vol. 2, p. 1111.) Great secrecy was enjoined by representatives of the Dyes Institute. (P. Ex. 34, Rec. Vol. 8, pp. 135, 136.) Mr. Polk, who it is claimed was empowered by Executive Order of December 3, 1918, to authorize private sales, had not been consulted or advised of the proposed plan. (Rec. Vol. 2, pp. 1194–1196, 1252 and 1253.) Mr. Palmer prepared his annual report to Congress (D. Ex. 30, Rec. Vol. 11, p. 1299) as of the 15th day of February, 1919, and it was formally transmitted to the President by letter dated February 22, 1919 (P. Ex. 13, Rec. Vol. 8, pp. 58 and 59), for transmission to Congress, in which report he mentioned this transaction as a concluded matter, although the terms of sale had not been agreed upon when the report was prepared; the purchasing corporation had not been incorporated; no authority to make private sale had been

obtained; and the purchasing corporation was not organized until the 8th day of March, 1919, after Mr. Garvan became Custodian. We shall show that the proposed transaction as reported was not only not concluded but was very different in many essential particulars from the transaction which was finally consummated.

It now became necessary to obtain authority to make a private sale, and Mr. Palmer appears actively in the matter for the first time. The President returned to Washington from Paris on the evening of February 25, 1919, and left again for Paris on March 4, 1919. (P. Ex. 106, Rec. Vol. 8, p. 297.) Mr. Palmer had prepared an Executive Order authorizing the sale of enemy patents to The Chemical Foundation, Incorporated, at private sale. This order was prepared for the signature of Mr. Polk, who it is claimed had been authorized by Executive Order of December 3, 1918, to exercise the power conferred upon the President by Section 12 of the Act as amended, to determine upon a private sale in lieu of public sale of property, stating the reasons therefor in the public interests. Although the President was in the White House, Mr. Palmer took this Order personally to Mr. Polk's office in the Department of State early on the morning of February 26th. (Rec. Vol. 4, p. 2616.) Mr. Polk being absent, later in the day Mr. Palmer transmitted the Order with a letter. (P. Ex. 90, Rec. Vol. 8, p. 279.) He also transmitted part of

the proof of his report to Congress. (Rec. Vol. 4, p. 2617.) In this letter it is stated that it was proposed to sell German-owned patents "which were never used in this country," although at that time a number of the more important of these patents were in active use by American manufacturers under licenses from the Federal Trade Commission. Mr. Polk signed the Order the same day. (D. Ex. 3 to Answer, Rec. Vol. 1, pp. 551 to 553.) Mr. Polk testified that he had never before heard of the matter, never saw the charter of the corporation, and knew nothing of the transaction except as stated by Mr. Palmer, and from information gained in glancing over portions of the proof of his report transmitted with the letter. (Rec. Vol. 2, pp. 1252 and 1253.)

It should be observed that at the time this order was entered substantially none of these patents had been seized by the Custodian; the number and character of the patents was not known; the proposed purchasing corporation had not been organized. The Order sought to authorize the Custodian to sell at private sale on such terms and conditions as the Custodian might fix all letters patent, "including all profits and damages recoverable at law or in equity for the past infringement thereof which the Alien Property Custodian may seize or may have seized under the provisions of said Trading with the Enemy Act and the amendments thereto, now or hereafter enacted and which he from time to time

shall determine relate to the objects and purposes of said Chemical Foundation, Incorporated, as expressed and defined in its charter." (Rec. Vol. 1, p. 552.)

The power which had been conferred by Congress upon the President himself to order private sale, to be exercised so sparingly that it required him to state his reasons therefor in the public interests, was thus sought to be conferred upon and exercised by Mr. Polk personally. He in turn did not undertake to determine the property to be privately sold, the terms of sale or to ascertain or determine himself the reasons for private sale, but, without knowledge of the charter of the purchasing corporation or of the transaction other than that gained from the Custodian, sought to confer upon the Custodian the power to determine in the present and in the future what property should be sold privately, the terms and conditions upon which such sales should be made, and all of the essential elements thereof, which, under the law, the President himself was required to determine and state as a restraint upon the power of the Custodian.

Among the reasons stated in this Order for directing a private sale is that The Chemical Foundation, Incorporated, was incorporated to hold these properties as trustee for American industries, to grant non-exclusive licenses on equal terms to American citizens and free licenses to the

United States. The charter of the corporation itself then in existence but not submitted to Mr. Polk expressly gave to the board of directors of the corporation, consisting of three members, the power to grant or refuse licenses upon such terms as they might see fit, and was an ordinary business corporation charter under the very broad laws of the State of Delaware. (Rec. Vol. 1, p. 90.)

The alleged authority for private sale having thus been obtained, no further steps were immediately taken in the matter, and Mr. Hoguet advised Mr. Gordon in charge of the seizure of patents that the need for haste was past as the Order had been signed. (P. Ex. 71, Rec. Vol. 8, p. 253.) Mr. Palmer resigned as Alien Property Custodian on March 4, 1919, and, on his recommendation, Mr. Garvan was appointed Custodian in his place. He stated that in a conference with the President on that day he informed the President of the facts in regard to these patents. It may be observed that his statement of the proposed transaction to Mr. Polk and the President as set forth in his testimony and in his report to Congress was very different from the transaction as it was subsequently carried into effect by Mr. Garvan.

Mr. Garvan having become the Alien Property Custodian and the matter being then entirely in his hands to act for both sides, steps were taken to complete the organization of the proposed purchasing corporation. A meeting of the incor-

porators was held, the minimum stock originally subscribed by the nominal incorporators was transferred to Mr. Garvan and two other gentlemen, who were elected directors and the latter were promptly appointed to positions as directors of various corporations under control of the Custodian, at liberal compensations. (Rec. Vol. 5, pp. 3031–3033, pp. 3055–3060.) Mr. Choate, who was on the staff of Mr. Garvan as Custodian, was elected General Counsel, and Mr. Hoguet, Patent Counsel of the Custodian, was appointed Patent Counsel of the corporation. (Rec. Vol. 5, pp. 3064–3069; P. Ex. 613, Rec. Vol. 10, p. 1480.)

The seizure of patents and other similar properties was then prosecuted with considerable vigor by Mr. Garvan under the direction of Mr. Hoguet. It was discovered, however, that the Executive Order signed by Mr. Polk only related to patents, trade-marks, and rights under letters patent and trade-marks, etc. They then discovered a number of valuable copyrights and other similar rights. An additional Order was therefore prepared by Mr. Garvan and forwarded to Mr. Polk at White Sulphur Springs, West Virginia. (Rec. Vol. 2, p. 1192; P. Ex. 92, Rec. Vol. 8, p. 280; P. Ex. 93, Rec. Vol. 8, p. 281.) It was there signed by him on the 5th day of April, 1919, authorizing on the same terms of the former order the sale to the Chemical Foundation, Incorporated, of copyrights, applications for patents, and other similar

rights. (Rec. Vol. 1, pp. 554 to 557.) An instrument of conveyance or assignment was thereupon prepared by Mr. Hoguet whether on behalf of the Custodian or The Chemical Foundation is not clear, as he was Counsel for both, and approved by Mr. Hoguet apparently in both capacities, conveying and assigning to The Chemical Foundation, Incorporated, 3,854 patents, including all of the valuable patents then under license by the Federal Trade Commission, 243 applications, 850 trade-marks, 492 copyrights, and 46 contracts for the use of patents, for the lump sum of $250,000, or $21.94, each.

At that time the 128 patents under license by the Federal Trade Commission, included in this lot, were yielding in revenue at the rate of approximately $300,000 per annum. (P. Exs. 198 and 198a, Rec. Vol. 8, pp. 473 to 477.) This assignment and conveyance was executed and delivered by Mr. Garvan as Custodian to The Chemical Foundation, of which he was also president, on the 10th day of April, 1919. (P. Ex. 58, Rec. Vol. 8, p. 187.)

On various dates subsequent thereto Mr. Garvan as Custodian seized other patents, copyrights, and other similar rights relating to various industries which The Chemical Foundation located and desired to acquire, and by instruments of conveyance transferred them to The Chemical Founda-

tion, Incorporated, for a nominal consideration. (Rec. Vol. 1, pp. 292 to 389; pp. 410 to 472.) The dates of these conveyances, the properties conveyed, and the consideration in each case are shown by the following table. All of these conveyances were made by Mr. Garvan to The Chemical Foundation, Incorporated, while he was Custodian and president of The Chemical Foundation, Incorporated, with the exception of the last two, which were made by his successor and were largely confirmatory of former transactions.

Statement of costs of properties acquired from Alien Property Custodian as verified with original assignments and in the case of April 10th assignment with photostatic copy of assignment

[See Defendant's Exhibit 92, Rec. Vol. 11, p. 2666.]

Date of assignment	Patents	Applications	Trade-marks	Copyrights	Contracts	Total cost	Average cost
1919							
Apr. 10	3,854	243	850	492	46	$250,000.00	$21.94
May 2			2		1	50.00	16.66
May 6	14					500.00	35.71
May 15	1					50.00	50.00
June 17	52	19			1	3,650.00	50.70
June 21	1	1	2		3	450.00	64.28
Oct. 17	21					1,050.00	50.00
Dec. 9		22				1,100.00	50.00
1920							
Mar. 9	26		20			2,300.00	50.00
May 4	32	1				1,750.00	53.03
May 15	401					5,000.00	12.46
Dec. 21	2					100.00	50.00
1921							
Feb. 19	351					5,000.00	14.25
Feb. 26					6	300.00	50.00
Apr. 27	9	2				550.00	50.00
Nov. 5 [1]							
Total	4,764	288	874	492	57	271,850.00	41.98

[1] Assignment of Nov. 5, 1921, for 136 trade-marks is included in assignment of Apr. 10, 1919. Total properties acquired, 6,475.

It will be observed that substantially all of the important properties were conveyed from April 10, 1919, to June 21, 1919, inclusive. The parties were apparently uneasy as to their title. On June 28, 1919, Mr. Hoguet, patent attorney for both the Custodian and the Foundation, wrote the Attorney General suggesting that " a more than friendly " suit be " immediately " brought and conducted " in a thorough understanding " to determine in a litigation " which we could control " the right of the Foundation to receive royalties under licenses issued by the Federal Trade Commission prior to transfer of these patents. Of course, a decree in favor of the Foundation in such a suit would have confirmed its title to these properties. The Assistant Attorney General to whom the matter came advised Mr. Hoguet that any such suit would have to be conducted " in every respect at arms length." (See correspondence Rec. vol. 8, p. 372, which we ask the court to read.) The suit was never brought.

This statement has been made in some detail on account of the size of the record. We have undertaken to avoid collateral questions and present the essential features of the transactions involved. Where any facts bearing upon any collateral matter or defence have been omitted as not material to the main case they will be noticed in the discussion of those points.

Viewed as a whole there can be no controversy as to the main features of these transactions or their results. They may be briefly summarized:

(1) Six thousand four hundred and seventy-five patents, copyrights, and other similar rights of widely different values, owned by thousands of persons, were in existence. Some of the more important of these rights had been licensed under the law to American citizens by the Federal Trade Commission acting for the President, and were then yielding an annual income of approximately $300,000. Any or all of them might have been so licensed to any American citizen desiring to use them.

(2) These properties were seized by the Alien Property Custodian on behalf of the United States, and thus came into the custody and possession of the United States, with full right in the United States to use them or to license them for use by any American citizen, and power reserved in Congress to dispose of them after the war. So long as they were held by the Custodian they were held under the law and subject to control of Congress.

(3) By the action of the Custodian and his associate officers or agents of the United States charged with the custody of the properties they were transferred en masse and without appraisal or apportionment of value to a private business corporation organized by those same officers, of which corporation they were also the executive

ficers at the time of the respective sales and ansfers.

(4) The result is that the ownership of these atents and other properties is now claimed to be this corporation and under the complete control the persons as private citizens who formerly eld them for the United States as public officials, nd they have the full power to grant or refuse enses for their use by American industry af- cted thereby on such terms and conditions as ey see fit, and to control all manufacture or le, importations into or exports from the United tates of products covered by said patents.

(5) The United States, on the other hand, have ly the pitiful sum of $271,000 in the Treasury to present property which was seized and had a lue of many millions. If Congress should order return of enemy property the United States ill be in the humiliating position of being unable return this property or even its proceeds, since e small amount in the Treasury is incapable of portionment among the thousands of former ners upon any equitable basis. In any event would not be enough to cover the actual cost and pense of securing the issue of the patents, and presents no property value therein.

(6) There will thus have been effected by execu- e officers of the Government charged with the stody of property of others, for the United ates, a complete confiscation of that property against the original owners, and as against the nited States a transfer thereof to themselves

for the benefit of private industry, in a manner which gives them control of that industry; and the powers of Congress over this property and the ability of the Government to discharge its international obligations as to the same are completely defeated.

When this situation was brought to the attention of the President of the United States, he, by letter to the Custodian, dated July 1, 1922, directed him forthwith to demand of The Chemical Foundation, Incorporated, a return of these properties to the Government and an accounting for the income thereof; and if this demand was refused, to take such action by suit or otherwise as the Attorney General might advise to protect and enforce the rights of the United States or any other persons concerned. (Rec. Vol. 1, p. 492.) This demand was made and refused. (Rec. Vol. 1, pp. 493 to 496.) This suit was then instituted.

Matters eliminated

Before taking up the discussion of the issues presented by the record, it seems desirable to eliminate certain matters which are deemed wholly immaterial, but which were the subject of elaborate statement and discussion by counsel and by the respective courts below.

(a) The seizure of the patents and other properties in question

Much of the discussion in the courts below was devoted to a justification of the seizure of these properties as against the enemy owners. This question is not involved in this case. The

Government does not question either the power to seize or the legality of the seizure. It was within the power of the Custodian, and was done. It placed the properties in the custody and possession of the United States. The issue in this case is confined to the legality of the sales or transactions by which they were transferred from the United States to a private corporation through what are claimed to be unauthorized and illegal acts of officers and agents of the United States.

(b) The alleged wrongs committed by the Germans against the United States and its industrial interests

A large proportion of the record in this case consists of testimony and documents claiming to show alleged wrongs of the Germans against the United States and its industrial interests. A large part of the respective opinions of the courts below, especially that of the District Court, is devoted to the same subject.

We then insisted and now respectfully suggest that all of this is wholly immaterial. Wrongs by Germany do not justify wrongs by us. If Germany or its citizens have committed any wrongs against the United States or its citizens they are questions for the Government of the United States in the international forum, or for the courts in proper proceedings in a domestic forum. This is not the place to seek to redress those wrongs. This is a suit by the United States against one of its own corporate citizens to recover property

formerly held by the United States and claimed to have been transferred illegally to this corporation by officers of the United States who were in custody thereof. This is an issue between the United States and its own citizens, with which the Germans have nothing whatever to do. The wisdom or unwisdom of the acts under review is not a question for the courts. The issue is purely one of law. If the acts complained of were within the power of the officers concerned and were lawfully done, they should be sustained. If they were not, they should be set aside, for the law is supreme. If the property in question is restored to the United States in accordance with the prayer of the bill, the question of its disposition will be one for Congress and for Congress alone.

We shall confine ourselves, therefore, to the discussion of the law as applicable to the essential facts of this case, and not burden that argument or obscure the issues by a consideration of the acts or policies of the Germans which are not before this Court.

(c) The importance and necessities of the dye and chemical industries

A large part of the briefs of counsel for appellee and of the opinions of both courts below has been devoted to a discussion of the importance of the dye and chemical industries to the commercial interests and the national defense of the United States. If the courts were charged with the duty of deciding upon the wisdom or policy of these

transactions or of plans for the national defense these discussions might be pertinent. But this is not the function of the courts. Organic chemistry is undoubtedly a fascinating study, but it does not aid us in determining what is the law. As to its importance to the interests of the United States there is no controversy, but the courts are not charged with the duty of deciding what is or is not in the interest of American industry or the national defense; nor do we find anything in the law which vests this power in the Alien Property Custodian. This is the function of Congress. The question for the courts to determine is what was the law applicable to this case, whether the acts complained of were within the power conferred by law upon executive officers involved, and, if so, whether these powers were lawfully exercised. If these questions are determined in the affirmative, the acts are valid whether they were in the interest of American industry and the national defense or not; if in the negative, they are void, it matters not how beneficial they may have been. It is purely a question of law.

The government, therefore, contends that the question of whether the acts complained of were or were not wise or expedient or beneficial to American interests is not involved in this case, and is not one within the proper cognizance of the courts. It will therefore be eliminated from the discussion.

(d) The motives of the parties concerned

Much of the answer of defendant, argument of counsel, and the opinions of the courts below is also devoted to a justification of these transactions on the ground of the high and patriotic motives of the Custodian and his associates, their desire to promote the interests of American industry, and similar altruistic purposes. This is not deemed material. The law presumes that men intend the natural and probable consequences of their acts, and takes cognizance of the recognized qualities of human nature. These parties are not on trial. The issues here presented relate to the legality of their acts and the validity of the title of appellee claimed through those acts as against the United States.

We shall, therefore, eliminate these questions from our discussion of this case, and confine ourselves to a consideration of the legality of the transactions under review.

ARGUMENT

Point I

The court erred in its construction of the Trading With the Enemy Act

This point involves directly a consideration of assignments of error I and II, and (Rec. vol. 7, pp. 5048–5050) in its more general bearing it affects all of the assignments of error going to the merits, since a proper construction of the Trading With the Enemy Act (40 Stat. 411) is the fundamental issue in this case. It would serve no good purpose

in this Court to go into an extended discussion of the nature and source of power of the Government to deal, in time of war, with the property of enemies outside of the zone of military operations. This question is no longer open for debate. It has been frequently held by this Court, and is now a settled principle of our law that, by Article I, section 8, clause 11, of the Constitution, this power is vested solely in Congress and may be exercised only to the extent and in the manner prescribed by Congress.

Brown v. *United States,* 8 Cranch, 110.
Conrad v. *Waples,* 96 U. S. 279.
Mrs. Alexander's Cotton, 2 Wall. 404.
Miller v. *United States,* 11 Wall. 268.
Stoehr v. *Wallace,* 269 Fed. 827, 255 U. S. 239.

It follows that where the subject matter is entirely under the control of Congress no executive officer, from the President down, has any power to deal with it except to the extent and in the manner authorized and prescribed by acts of Congress. If an executive officer undertakes to exercise, as to such subject matter, a power not conferred by an Act of Congress, or undertakes to exercise a power so conferred in a manner not authorized by, or contrary to, those Acts, then his acts and transactions are, to that extent, void as against the United States. This is as true in time of war as in time of peace. These principles are so obvious from the nature of our Government and have been so often

stated by this Court that they may now be deemed elementary in our law.

Brown v. *United States*, 8 Cranch, 110.
The Floyd Acceptances, 7 Wall. 666.
Ex parte Milligan, 4 Wall. 113.
United States v. *Lee*, 106 U. S. 196, 220.
United States v. *Cohen Grocery Co.*, 255 U. S. 81, 88.

In the Trading With the Enemy Act, Congress, in the exercise of its Constitutional power, fixed the policy of the United States with respect to enemy property during the late war, conferred upon executive officers certain powers and duties with respect thereto, and prescribed by whom and in what manner these powers should be exercised and duties performed, subject to such limitations and restrictions as might be prescribed by law. If, when examined and tested by law, the transactions complained of are found to be within the powers conferred by law upon the respective executive officers and to have been performed in the manner prescribed by or not in conflict with law, then they are valid. If not, they are void as against the United States, for the officers of our Government, whether high or low, are only agents of the law. The wisdom or expediency of these acts or transactions, the benefits or injuries to the United States, or its industrial interests, which may flow therefrom, the good or bad motives of the parties concerned, are not now under consideration. These principles, as to our system of Gov-

ernment, are no longer open to controversy. They are clearly stated and applied in the following decisions of this Court, among others, which may be cited:

The Floyd Acceptances, 7 Wall. 666.
Ex parte Milligan, 4 Wall. 113.
United States v. *Lee*, 106 U. S. 196, 220.
Mitchell v. *Harmony*, 13 Howard 115.
Morrill v. *Jones*, 106 U. S. 466.
Moore v. *Robbins*, 96 U. S. 530.
Interstate Commerce Commission v. *Illinois, etc., Railroad Co.*, 215 U. S. 453.
Dakota, etc., Co. v. *South Dakota*, 250 U. S. 163.

1. Pertinent provisions of the Trading With the Enemy Act

The general purpose of this statute was to define the term "enemy or ally of an enemy," to declare who came within this description, and to regulate intercourse with such persons during the existence of a state of war. The provisions relating to the seizure, management, and disposition of enemy property constitute only a part of the Act.

The provisions which are pertinent to the issues in this case are embodied in Sections 2, 5, 6, 7, 9, 10, and 12 of the Act. The essential features of these Sections have already been stated. (Ante, pp. 8 to 18.)

The plan thus devised by Congress for dealing with "enemy" property and embodied in these sections of the statute provided:

(*a*) Who should be deemed "enemies" and how this status should be determined. (Section 2.)

(*b*) For the seizure and taking possession of property of persons found to occupy the "enemy" status as so defined, and the exercise of certain other powers under the Act. (Sections 5 and 7.)

(*c*) For the licensing to the Government or to American citizens of the right to use enemy-owned patents, copyrights, etc., the seizure of which was not authorized by the original Act. (Section 10.)

(*d*) For the custody and management of such property while in possession of the United States by an Alien Property Custodian created for that purpose, acting under the "supervision and direction" of the President. (Sections 6 and 12.)

(*e*) For a method of relief by application to the President, or through the Courts, to any person whose property was erroneously or wrongfully seized under the Act. (Section 9.)

(*f*) It reserved to Congress the determination of and control over the disposition of the property seized or the proceeds thereof "after the end of the war." (Section 12.)

This statute as originally passed was clearly an Act for the seizure of enemy property, its conservation during the war in accordance with well-recognized principles applicable to property held in trust, and its final disposition after the end of

the war, as Congress might then direct. As to this construction of the original Act, all parties were and are in agreement. (Rec. Vol. 7, pp. 4998, 4999, and 5018.)

2. Amendments to the act

There have been a number of amendments to the Trading with the Enemy Act. While some of these amendments have only an indirect bearing upon the issues in this case, they may all be enumerated in their order for convenience.

(*a*) Amendment of March 28, 1918 (40 Stat. 459), to section 12 enlarging the power of sale conferred upon the Custodian. The construction of this amendment is one of the chief issues in the case and will be hereinafter fully considered.

(*b*) Amendment approved July 1, 1918 (40 Stat. 645), which provides in effect that all taxes assessed against money or property held by the Custodian shall be paid out of such money or property or if that is not sufficient, out of other monies of the same enemy. This shows the purpose and intent of the Act to create and maintain separate trusts as to each property seized and each "enemy."

(*c*) Amendment of September 24, 1918 (40 Stat. 966), as to foreign exchange.

(*d*) Amendment of November 4, 1918 (40 Stat. 1020) to section 7c. The purposes of this amendment have already been referred to, and are fully explained in the statement of Mr. Bradley, General Counsel for the Custodian, to a Committee of

Congress. (Rec. Vol. 1, pp. 75–90.) We have seen that the original Act did not authorize the seizure of patents and similar properties, but that the use thereof under license was provided for by section 10. The Custodian represented to Congress that it was desirable to have authority to seize patents used in or essential to industries which he wished to sell. He also desired provisions requiring corporations to issue and deliver shares of stock without surrender of outstanding certificates in enemy hands; and some provision by which the title of the purchaser of property sold by him, under section 12, would be fully protected. This amendment accomplished these three purposes by (1) authorizing the President to seize patents, copyrights, etc.; (2) requiring the issue of certificates of stock by corporations on demand of the Custodian without surrender of outstanding certificates; and (3) limiting the right of any person having an interest in or claim to property sold by the Custodian, to an interest in or claim to the proceeds thereof similar to the usual provisions of a decree of foreclosure. This amendment is important in this case.

(*e*) Amendment of July 11, 1919 (41 Stat. 35), authorizing the return of property to certain classes of persons.

(*f*) Amendment of June 5, 1920 (41 Stat. 977) providing further for return of property to certain persons formerly citizens of Germany and Austria.

(*g*) Amendment of February 27, 1921 (41 Stat. 1147) providing further for return of property.

(*h*) Amendment of December 21, 1921 (42 Stat. 351) extending time for claims under section 9.

The four amendments last recited have no bearing upon this case, except as indicating the policy of Congress in the exercise of the power reserved to itself under section 12 to determine upon a disposition of this property after the war.

(*i*) The last amendment is the so-called Winslow bill, approved March 4, 1923 (42 Stat. 1511), which provides for the return of not exceeding $10,000 of the principal of each trust held for the account of former enemies, and the net income from any property "held in trust for such person" to an amount not exceeding $10,000 per annum. This amendment is important in many particulars, especially as a declaration by Congress of the true meaning and intent of the Act and the purpose of Congress with respect to this property. This will be considered further hereinafter.

It will be observed that the three amendments which have a direct bearing upon the issues in this case are those of (1) March 28, 1918, to section 12; (2) November 4, 1918, to section 7c; and (3) the Winslow bill of March 4, 1923. We shall now consider the pertinent sections of the Act as so amended.

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3. Section 12 as amended

The essential provisions of this section as originally enacted and as amended are as follows (the words in the amendment which were not in the original Act are for the sake of convenience italicized):

ORIGINAL	AS AMENDED
The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, *which shall come into his possession* in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds	The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, *which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him* in pursuance of the provisions of this Act, and *in addition thereto,* acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, *shall have power to* manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights *or powers* which may be or become appurtenant thereto or to the ownership thereof *in like manner as though he were the absolute owner thereof: Provided, That any property*

thereof, may be preserved and safeguarded. * * * The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

* * *

After the end of the war any claim of an enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.

sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: Provided further, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. * * * The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

* * *

After the end of the war any claim of an enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.

Since the construction of this section of the A
as amended is a basic issue in this case, it seer
important, before taking up the discussion of t
section, to state clearly the positions of the parti
on this issue.

The Government takes the view that this w
an Act for the seizure and conservation of enen
property during the war and until Congress shou
exercise the powers expressly reserved to mal
disposition thereof after the war. This is a
mitted as to the original Act.

The Government then contends that the amen
ment made no change in the nature and gener
purpose of the statute, but only changed the a
ministrative powers of the Custodian by givi
him a general power of sale instead of a power
sell to prevent waste, etc., as in the original se
tion; that the amendment then imposed limitatio
upon the exercise of this power by requiring
public sale in every instance, unless the Presider
for reasons which must be stated determined upo
a private sale, in which event the Custodian mus
exercise the power as a trust power and sell pr
vately in accordance with the statute and rules o
law applicable to such sales by trustees or publi
officers. It is the view of the Government tha
this power of sale was nothing more than an ordi
nary power such as is being exercised daily b
trustees and other fiduciaries under deeds an
wills, and must be so exercised as to substitute fo

the property sold what is in law its fair equivalent to be held for final disposition by Congress.

On the other hand, it is contended on behalf of appellee that the Amendment of March 28, 1918, to Section 12 effected an entire change in the character and purpose of the Act; that whereas the original act was one of conservation of enemy property, the amendment changed it into an act of confiscation, giving to the Custodian full power, acting under the supervision and direction of the President, to make final disposition of this property and any beneficial interest therein in his discretion, as though he were the absolute owner thereof, both as against the former enemy owners and the United States. The Courts below, adopting this view, held that while the transactions in question must be sustained, if at all, as sales (Rec. Vol. 7, pp. 4914, 5022), they were sales made for a nominal and inadequate consideration in money, under such conditions as destroyed the "monetary value of the property (Rec. Vol. 7, pp. 4926, 5025, 5041–5042)," and were in effect a "devotion" of the property to the public interests (Rec. Vol. 7, p. 4955) which is, of course, but another name for confiscation. (Rec. Vol. 7, pp. 5024–5026.)

It is admitted by all parties that our interpretation of the statute as originally passed is correct, that it was purely an act of conservation, providing for the custody and conservation of this property until after the War and until Congress should direct its final disposition. It is admitted that if

the sales in question had taken place under the original statute they would have been unlawful and void as against the United States. We thus have the original section to aid us in construing the amendment.

The original section provided that as to all property coming into his hands the Custodian should "be vested with all the powers of a common-law trustee." This language is unchanged in the amendment. It is assumed that this means the powers of an ordinary trustee in equity under the chancery practice as derived from England. These powers are well known and are very limited.

The next clause in the original act provided that he should act under the "supervision and direction of the President, and under such rules and regulations as the President shall prescribe." The only change in this clause made by the amendment is to insert the words "in addition thereto" after "and," which means exactly the same thing. In other words, in addition to the limited powers of a "common law trustee" it was proposed, by the section originally and as amended, to confer certain powers well known to the law of trusts and in daily exercise under our law, and these powers should be exercised under the supervision and direction of the President. Nothing is more common than to provide that trustee powers shall be exercised under the supervision and direction of someone else, but that does not change the nature of the trust powers. It only tends to guard against

their abuse. The record shows that after the amendment was passed, the Custodian did, in June 1918, apparently with the approval of the President, promulgate elaborate rules for the conduct of sales under this act, requiring, before the sale of any property, an accounting of its earnings for three years, appraisal of its value, full advertisement, and other provisions to ensure a fair sale, all of which were in strict accord with the accepted practice with respect to sales of trust property. (P. Ex. 3, Rec. Vol. 8, pp. 14–27.) But none of these steps were taken and none of these rules applied as to the sales here in question. This provision and its administrative application only confirms our construction as to the strictly trust character of this statute.

The next clause of the original section provides that the Custodian (acting under the supervision and direction of the President) "may manage such property and do any act or thing in respect thereof or make any disposition thereof or any part thereof *by sale or otherwise* and exercise any rights which may be or become appurtenant thereto or to the ownership thereof." (Italics ours.) This language is unchanged in the amendment, except that for the word "may" in the original are substituted the words "shall have power" in the amendment, which certainly does not change the meaning in any way; and for the words "exercise any rights" in the original are substituted the words "exercise any rights or powers" in the

amendment. A power with respect to property is a right and *vice versa*. We do not think it will be contended that these slight and immaterial changes in verbiage affected the nature or meaning of the section.

A good deal was said in argument and in the opinions of the courts below as to the words "by sale or otherwise." It was claimed that these words gave unlimited power to dispose of the property as the Custodian saw fit. Both of the lower courts emphasized this language and then held that the words "or otherwise" *had nothing to do with this case, since only sales were authorized, and the transactions must be sustained as sales if they were sustained at all.* (Rec. Vol. 7, pp. 4914, 5022.)

This language was in the original statute and was unchanged by the amendment. The facts as to the use of this expression in the original statute, as shown by the record, were that when the original act was under consideration it was brought to the attention of the Committee of Congress that much of the property that would come into the hands of the Custodian would be in the form of stocks and bonds; if only a power of sale was given it might not authorize an exchange of securities in reorganizations and other similar transactions which would be of benefit to the trust, and would cause embarrassments to these corporations and to legitimate industry. To meet this situation the words "or otherwise" were inserted. Under the familiar doctrine of *ejusdem generis*, they

would in any event be construed only to authorize transactions similar to sales, i. e., a transfer of property or evidence of property for its equivalent.

Words and Phrases, Vol. 6, 5105.
Williamson v. *Berry*, 8 How. 495, 543.
Woodward v. *Jewell*, 40 U. S. 247, 249.
Tallent v. *Fitzpatrick*, 253 Mo. 10, 19.

Since, however, these words were in the original statute, which is admitted and held by the courts below to be one of conservation and would not authorize the transactions under review, and since those courts held that these transactions were sales and must stand or fall as such, it is difficult to see what bearing these words can have on this case. We are only concerned with sales and the courts below so held.

Down to this point there was certainly no material change even in the words of the statute resulting from the amendment. We now come to the provisions which it is claimed wrought a fundamental change in its nature and purpose. The original section provided that the power of disposition "by sale or otherwise" and other powers enumerated might be exercised "if and when necessary to prevent waste and protect such property, and to the end that the interests of the United States in such property and rights or of such other persons as may ultimately become entitled thereto or to the proceeds thereof may be preserved and safeguarded." This language conferred no addi-

tional power. It only expressed the purposes for which the powers given were to be exercised. It was really surplusage, for this was clearly the object of and the purpose for which trust powers such as those given are and should always be exercised.

The amendment, after enumerating the powers given in substantially the exact language of the original act, instead of stating the purpose, declared that the Custodian might exercise these powers "*in like manner* as though he were the absolute owner thereof." [Italics ours.] It is upon this language that the courts below hang their decision that the Act authorized a confiscation of property and a disposition such as was accomplished by the transactions under review. The reasoning proceeds as follows: An absolute owner has power to make complete disposition of property in any manner he sees fit. The Custodian was given power to dispose of this property " as though he were the absolute owner thereof." Therefore the Custodian must be deemed to have been given power to dispose of this property in any manner and for any or no consideration, in his absolute discretion. (See District Court opinion, Rec., Vol. 7, pp. 4913–4916; C. C. A. opinion, Rec., Vol. 7, pp. 5021–5025.)

In reaching this conclusion the Court omitted an important part of the language. It says (Rec. vol. 7, p. 4915) the statute grants express power to use the property " as though he were the absolute

owner thereof." The statute, however, says that these powers may be exercised "*in like manner* as though he were the absolute owner thereof." (Italics ours.) The two things are very different. One assumes absolute ownership, the other prescribes the *manner* in which powers given in trust shall be exercised. The Appellate Court seems to fall into the same error. Both courts place much emphasis on the language authorizing the Custodian to make "any disposition" thereof "by sale or otherwise," apparently overlooking entirely that this exact language was used in the original section, which they hold was a strict trust for conservation, and would not have authorized the transactions in question. They then hold that this language has no bearing on this case, as these transactions were sales and must be sustained as such. Then why emphasize that which is immaterial? We confess our entire inability to follow the reasoning of either court on this point.

Viewed in the light of the context this language seems perfectly plain and incapable of such a strained construction. This property was held by an officer of the United States for the United States or such persons as Congress after the War might determine. It was held under an express trust. To say that the Custodian had or could have any ownership absolute or otherwise therein was to state an obvious impossibility. If he had no ownership, he could not sell "as though he were the absolute owner." But he could be given power

of sale as a trust power, to be exercised "in like manner" as if he were absolute owner. The property was held in trust: the power was a trust power, given in trust, to be exercised for the purposes of the trust. But he was given broad discretion as to what property should be sold, the time of sale, the manner of sale except as limited by the Act, and the title conveyed by him was to be complete. All of these are elements of discretion which an owner may exercise or are conditions incident to sale by an owner. But at best he was not owner; he must make a sale, and it must be a sale of trust property by a public officer. While he had discretion as to the matters stated, he must not dissipate his trust but must by sale place in the hands of the United States what the law regards as the equivalent in value of the property sold. A sale is "a transfer of the absolute or general property in a thing for a price in money or its equivalent."

Benjamin on Sales, Sec. 1.
Williamson v. *Berry*, 8 How. 495, 543.
Illinois v. *McFarland*, 110 U. S. 471.
DeBarry v. *Lover*, 101 Fed. 425, 427.

On the other hand, the transfer of property of another for public use for no consideration or a nominal consideration or the "devotion" thereof to the public use is confiscation, pure and simple.

Bouvier Law Dictionary, Rawle's ed., "Confiscation." 1 Kent Comm., 52 *et seq.*

There is no mystery about this language giving to fiduciaries power of sale "in like manner" as

an absolute owner. This very expression is in constant use in trust instruments, and is universally held to confer only a power in trust, to be exercised under the rules respecting trusts and for the purposes of the trust.

In re Bauernschmidt's Estate, 97 Md. 35. 51.

Stocker v. *Foster*, 178 Mass. 591.

In re Coger, 111 N. Y. 343.

Tallent v. *Fitzpatrick*, 253 Mo. 10.

Terry v. *Rector*, etc., 79 App. Div. (N. Y.) 527.

Smith v. *Bell*, 6 Peters 68.

Brandt v. *Virginia*, etc., Co., 93 U. S. 326.

Bradley v. *Westcott*, 13 Vesey 445.

Following the power thus given is the proviso, not in the original act, placing strict limitations upon the exercise of that power, so that while the amendment gave the Custodian enlarged powers as to making sales it actually imposed further limitations upon the method or manner of sale. The language of the proviso is as follows:

> *Provided*, That any property sold under this act, except when sold to the United States, shall be sold only to American citizens at public sale to the highest bidder, after public advertisement of the time and place of sale, which shall be where the property or a major portion thereof is situate.

As we shall see, Congress carefully considered this language. It was added, after the bill was reported, for the express purpose of safeguarding

this trust and having this property or its fair equivalent in the custody of the United States for disposition by Congress after the War. (Cong. Record Vol. 56, Part 4, pp. 3328, 3942, 3944.)

We have now dealt with all of the powers given to the Custodian under this section originally and as amended. There is nothing in the language to change the statute from one of conservation and administration of trust property to one authorizing a confiscation or donation thereof by the officer charged with its custody. On the contrary, the amendment, instead of loosening the *powers of sale,* actually imposed additional restrictions upon their exercise. The Custodian could have sold publicly or privately under the original section; under the amendment he could only make public sales under strict limitations.

We now come to the power of the President under the last clause of the proviso to the amended section. It will be noted that the power of sale was vested in the Custodian, not in the President. Under the original section there was no method of sale prescribed, but under the amended section sales by the Custodian were required to be public sales subject to the various limitations stated. We all know, however, that in the administration of both public and private trusts conditions arise which render public sales injudicious or even prejudicial to the trust estate. In such cases a court of chancery may, as to private trusts, generally order a private sale, stating in its order its

reason for varying from the accepted practice of public sales of trust property. Congress was familiar with these precedents. To provide against these contingencies, Congress, after careful consideration and debate (Cong. Rec., Vol. 56, Part 4, pp. 3328, 3942, 3944, 4003), inserted at the end of the proviso requiring public sale the words, "unless the President, stating the reasons therefor, in the public interest shall otherwise determine."

This language is a part of the proviso referring to property "sold under this Act." It, therefore, relates entirely to sales, and the Court of Appeals so held. (Rec. Vol. 7, p. 5023.) When the President, for reasons stated, determined upon a private sale and so ordered, the Custodian then had power to make a private sale, the same to be conducted fairly as sales by public officers must be, and in a manner which would substitute for the property the proceeds thereof, representing in law its fair equivalent, to be held to await final disposition by Congress. This language, and the purpose and intent thereof, seem too clear to require extended discussion.

Having thus provided for sales of this property, the amendment contained a further provision authorizing the Custodian on order of the President "stating the reasons therefor" to reject bids and make resales. This provision is not involved in this case, except that it shows the extreme care exercised by Congress to insure fair sales of this property. Finally, in the amendment, the lan-

guage of the original act reserving to Congres power of final disposition of the property " afte the end of the war " is continued unchanged.

Both Courts below held that as to the trans actions in question only sales were authorized o attempted, and that these transactions must b sustained, if at all, as sales. (Rec. Vol. 7, pp 4914, 5022.) Both Courts held that as sales th consideration to the Government, viewed in th light of the value of the property, was inadequate The District Court held that this was conceded (Rec. Vol. 7, pp. 4926, 5025, 5041–5042.) Th Court of Appeals held that the consideration wa " grossly inadequate," basing its conclusion o the single fact that some 126 of these patent which were being used under nonexclusive license from the Trade Commission or under contract held by the Custodian, were yielding a revenue o approximately $300,000 a year at the time tha they were all sold for a gross consideration o $271,000. (Rec. Vol. 7, p. 5039.) No other con clusion seems possible. It would seem to follow as a matter of course that the transactions wer void as against the United States.

The Courts below in avoiding this conclusio take an entirely different view of the statute The District Court holds in effect that the Custo dian, " acting under the supervision and directio of the President," had power to dispose of thi property as " though he were the absolute owner " thereof (Rec. Vol. 7, p. 4914), under terms an

conditions which might destroy its "monetary value" (Rec. Vol. 7, p. 4918), and in effect constitute a devotion thereof "to the public use" (Rec. Vol. 7, p. 4918).

The Court of Appeals affirming this view held in effect that the statute as amended gave power of "final disposition" of the property, although such disposition operated as a confiscation as to the original owners, and a disposition "for less than their value to the United States." (Rec. Vol. 7, p. 5025.) Both Courts held that the Custodian in making sales of this property could take the benefits to the public or "public interests" as he might determine them as "consideration" in whole or in part, or *quid pro quo* for the transfer of the property. (Rec. Vol. 7, pp. 4914, 5025.)

The Government contends that these positions are erroneous on two general grounds:

(*a*) Because there is nothing in the language of the statute to justify such conclusions. As we have pointed out, the statute gave the Custodian a simple and familiar power of sale, such as is exercised daily by Government officers as to property owned by or in the custody of the Government, the proceeds to be paid into the Treasury for disposition by Congress. There is not a suggestion of confiscation as against the original owners; not a suggestion of a grant of power to the Custodian to devote property in his custody to the public use. Every provision of the statute

negatives such a suggestion. While the stat
requires the President to state his reasons '
the public interest" for *ordering a private s*
it does not refer to the public interest as to
exercise of power of sale by the Custodian,
certainly does not suggest any power or autho
in him to determine upon the "public interes
and accept benefit to the public presumed to a
from the use of the property as the considerat
for the sale or transfer thereof. This is pure c
fiscation and entirely inconsistent with the i
of sale which was the power given. Section 6
the Act required the Custodian to hold and "
count for" property which came into his han
It is difficult to see what effect is to be given to t
section if it is held that he had power to ma
absolute disposition thereof "as though he w
owner."

(2) There could have been no public inter
served by this grant for nominal considerati
If there was a confiscation of this property "
the public interest" it must have vested in t
United States. The United States would th
have had full power to use or permit the use
the same in any manner which the public inter
might require. It is impossible to conceive
any public interest which could then be served
a grant from the United States to a private c
poration for a "grossly inadequate" consider
tion, or any benefit to the public which cou
serve as a valid "consideration" for the gra

The United States is quite as capable of serving the public interests as a private corporation. A sale for an adequate consideration is one thing; a grant of property in the custody of the United States for a nominal or "grossly inadequate" consideration (C. C. A. Rec. Vol. 7, p. 5039) is another thing, and we find no suggestion of authority for such a transaction in this statute.

We can not better conclude the discussion of this point than to quote the language of Hon. A. Mitchell Palmer, who was Alien Property Custodian when this Act was passed, and thereafter until March 4, 1919, when he became Attorney General of the United States. Mr. Palmer testified in this case that he drew the Amendment of March 28, 1918, to Section 12, and appeared before the Committee to urge its passage. (Rec. Vol. 4, pp. 2539, 2545.) In a hearing before a subcommittee of the Committee on Judiciary of the Senate on July 27, 1922, on Senate Bill 3852 to further amend this Act, Mr. Palmer appeared as a witness. In discussing this amendment of March 28, 1918, to Section 12, he said:

> The purpose of that amendment was merely to convert the property of the Germans in this country into cash, and behind that was the purpose to dislodge the Germans' foothold in American industry and commerce. There was no intention of taking this property out of the provisions of the Trading with the Enemy Act; but the intention simply was to convert it into

money and to hold that money for all t
purposes for which the original proper
was to be held under the Trading with t
Enemy Act.

This is the construction of this statute give
by the man who drew it and administered it
Custodian and was afterward Attorney Genera
given three years after the transactions here
mentioned took place and about one month befo
this suit was brought. It is the construction f
which the Government contends. It is in dire
conflict with the construction now given by t
Court.

This construction, drawn from an examinatio
of the language of the Section as amended, is su
tained and confirmed by its legislative history, t
administrative construction of the Act, and b
pertinent judicial decisions which will now b
examined.

**4. The legislative history of the amendment to Se
tion 12**

The original act is conceded to have been only a
act of seizure and conservation. The extraordinar
powers now claimed are predicated upon th
amendment. We shall only refer therefore to th
legislative history of the amendment.

This amendment to Section (12) was submitte
along with another amendment which the Presiden
had requested, authorizing the acquisition of docks
piers, and other terminal properties of the Ham
burg-American Line and the North German Lloy

Line at Hoboken. (Rec. Vol. 4, pp. 2538, 2539.) In presenting these, Mr. Palmer, Alien Property Custodian, after explaining that these piers and docks belonged to two American corporations, the entire capital stock of which was owned by the two German steamship companies and which had all been seized by him as Custodian, and in stating the reasons for submitting the two amendments to Section 12, said:

> Mr. PALMER. The suggested amendment rewrites section 12 of the trading with the enemy act. Practically the only change, however, is to omit the following words:
>
> "If and when necessary to prevent waste and protect such property, and to the end that the interests of the United States in such property and rights, or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."
>
> Senator JONES of Washington. As I understand, if we should adopt that, it would leave that section substantially as the Senate passed it.
>
> Mr. PALMER. Substantially as the Senate passed it; so that the power of sale of the Alien Property Custodian would read:
>
> "The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, delivered, or paid over to him"—

It put in "has been or shall be" because of the fact that we had been taking over property—

"In pursuance of the provisions of this act and in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof." (Hearings on H. R. 9867 before Senate Committee on Appropriations, 65th Cong., 2d sess., p. 16.)

This statement of both the purpose and the effect of the amendment desired is concise and clear and just what the Government contends Congress intended to enact and did enact.

On March 9, 1918, these two amendments to the Trading with the Enemy Act were submitted to the Senate as a Committee of the Whole, upon consideration of the Bill H. R. 9867, which was the Urgent Deficiency Appropriation Bill for the fiscal year ending June 30, 1918. These two provisions under consideration were inserted as amendments to this bill under the heading of "Alien Property Custodian." (Congressional Record, Vol. 56, pt. 4, pp. 3262 and 3263.)

On March 11, 1918, the Senate was again considering these matters, and Senator Martin, chairman of the Committee on Appropriations, in explaining the purpose of this amendment to Section 12, said:

> This amendment simply provides that this property *shall be put fairly on the market;* that it shall be sold; and that the proceeds shall be put in the Treasury of the United States and invested in liberty bonds or the proceeds in some way used for the prosecution of this war, which has been precipitated upon us by the barbarous conduct of the German Empire. We do not go at all into the policy after the war. (Congressional Record, Vol. 56, pt. 4, p. 3319.)

Senator Underwood, during the discussion before the Senate on March 11, 1918, stated that the amendment to Section 12 then before the Senate simply put back the Trading with the Enemy Act as it stood when the Senate first passed the original act in 1917, when it was admittedly an act of seizure and conservation. (Cong. Rec. Vol. 56, pt. 4, p. 3322.)

At this same session of the Senate, Senator Frelinghuysen offered an amendment to this amendment of Section (12) under consideration, which later developed into the two provisos found in the amendment as enacted. (Congressional Record, Vol. 56, pt. 4, p. 3328.)

On March 23, 1918, Senator Underwood presented to the Senate the report of the Committee of Conference on amendments to the Bill H. R.

9867. In this conference, the amendments to t
Trading with the Enemy Act, the first as to t
docks and the second as to the fourth paragraph
Section (12) were at last agreed upon in the form
which they were finally passed and approved
the President. (Congressional Record, Vol. 5
pt. 4, p. 3942.)

In discussing these changes, Senator Underwo
stated as follows:

> Mr. UNDERWOOD. I see no reason why t
> report should go over. There are no gre
> changes in the bill as it passed the Senat
> In the alien property custodian provisi
> the conference report brings the bill ba
> substantially as it passed the Senate. T
> only exception to it is that it strikes out t
> original amendment offered by the Senat
> from New Jersey (Mr. Frelinghuysen) a
> in lieu thereof the House conferees propos
> a suggestion, which was agreed to, provi
> ing for all the Frelinghuysen amendme
> provided for in the way of a public sale, bu
> in addition to that, providing that the
> should be advertisements in the newspaper
> that the property should be sold where t
> larger portion of the property was locate
> and that it should not, under pains a
> penalties of the law, be sold to an ali
> enemy. That is all the change.
>
> Mr. GALLINGER. Did I understand t
> reading of the conference report correct
> that, notwithstanding the provision is f
> public sale, the President may order t
> property sold otherwise? If so, I shou

like to know why that provision is modified to that extent?

Mr. UNDERWOOD. I was coming to that. The only modification in that respect is that it does not leave everything to the Alien Property Custodian. The proposed change is "when the President shall determine," not "prescribe." As I understand, when we provide that the President shall "prescribe" he may make rules and regulations, but the change here is that "when the President shall determine," which *will require the personal act of the President*. That change has been made because there may be conditions arise in the disposition of this property where it would be impossible to sell it at public auction without it possibly going into the hands or control of alien enemies or persons who are unfriendly. The committee of conference thought that was wise and that it was within the line of the original bill as it passed the Senate, because when the alien property act originally passed the Senate there was no limitation whatever. Now, this merely gives ~~the right to~~ the Alien Property Custodian in an exceptional case to appeal to the President to allow a certain portion of such property *to be sold not by public auction but by negotiation*. Then the President must indicate in writing why he has done so. I think the situation is thoroughly guarded from the standpoint of the Senator from New Hampshire.

> Mr. GALLINGER. Is it specifically provided that the President shall give his reasons in writing for the exception?
>
> Mr. UNDERWOOD. It is provided that he shall give his reasons in writing. It says he shall determine and state his reasons in writing. (Congressional Record, vol. 56, pt. 4, p. 3944.)

Further discussing the amendment to Section 12 of the Act, Senator Underwood said (Congressional Record, vol. 56, pt. 4, p. 4003):

> As to the item referred to by the Senator from New Jersey, the only changes made in that item were to specify more distinctly the terms and conditions of public sale and to authorize the President, when he directed that it should be done and gave in writing his reason for so doing, to set aside one of these sales.
>
> The personal action of the President is required to accomplish that result and he is required to give in writing his reasons therefor. It seems to me clear that there ought to be that opportunity under the Act. Cases may arise when you can not reach *the desire of the Government to protect this property or the desire of the Government to take it away from an alien enemy by public sale*, and if the President of the United States, acting himself and not through an agent, determines that it is necessary to be done, and in writing gives his reasons for doing so, it seems to me that is ample protection to the public and to the property.

On March 26 these amendments were discussed in the House. Mr. Shirley, in presenting the conference report, with reference to the amendment to Section (12), said (Congressional Record, vol. 56, pt. 4, p. 4083):

> *We also recognized the desirability of safeguarding, so far as it can be done, the disposition of this property, which runs into the hundreds of millions, having in mind the major purpose of the legislation,* and that presented the real problem to the conference, a problem that was not entirely easy of solution. We present to you the report in the belief that it has been intelligently solved. We provide that when the property is sold it shall be sold at public sale, after public advertisement, where the property or the major portion of it is situated, to the highest bidder, who shall be an American citizen. That is the broad rule that we lay down as being the policy that ought to be and shall be followed in all these cases where there is not some compelling reason otherwise. But, having laid down that general principle, we provide that the President, for reasons stated, shall have the right to order the disposition of this property by private sale or otherwise——
>
> Mr. LONGWORTH. Will the gentleman yield?
>
> Mr. SHERLEY. In a moment. And we further provide that after the sale has been made the Alien Property Custodian may upon order of the President set aside such

sale for reasons stated, and subsequently t
property may be sold by public sale or othe
wise, as the President may direct. In oth
words, we state as the judgment of the Co
gress that the property, unless there be sp
cial reasons to the contrary, when sold, sh
be publicly sold, but we give to the Preside
the power in the interest of the Nation
declare that it shall be disposed of otherwi
when in his judgment it is necessary so
do in order to protect national interes
Now I yield to the gentleman.

* * * * *

After this amendment was passed, Mr. Palm
then Custodian, in a hearing before the Hou
Committee on Interstate and Foreign Commer
on Bill H. R. 12338 (p. 35) in June, 1918, made t
following statement on this amendment.

Therefore our plan is to keep these co
porations going, in the same efficient mann
as they have been operated heretofore, wit
out cutting prices or cutting down profi
entering into the usual competition
American business, and finally sell them n
for junk, which they would be sold for
we smashed them in the meantime by th
kind of treatment, but for a fair a
adequate price, which we can put into t
Treasury and say to the enemy owners wh
the war is over, "*We will deal with y
about this money we have got in t
Treasury, which is the fair value of yo
property, and not about the property itself*
[Italics ours.]

If there be any doubt from the language of the act itself, this record should be conclusive as to its purpose and intent, and therefore as to its proper construction. The intent as expressed by the unanimous voice of those who drew and enacted the statute is in direct conflict with the construction thereof given by both of the lower courts.

5. In the administration of the act the construction contended for on behalf of the Government has been uniformly adopted with the sole exception of the transactions now under review

Very soon after the amendment of March 28, 1918, was adopted the then Alien Property Custodian, at whose suggestion and request the amendment was made, created in his organization a Bureau of Sales and, under date of June 6, 1918, promulgated Rules and Regulations to govern the sales to be made under the authority of this amendment. (P. Ex. 3, R. Vol. 8, p. 14.)

This order of June 6, 1918, in stating the purpose and object of creating these committees and promulgating these rules, says:

> It is necessary that every precaution shall be taken to enable properties to be sold fairly and for a proper price, without any possibility of favoritism or undue advantage in favor of any particular purchaser. The experience and views of the Advisory Committee will be especially desired in guarding against any such possibility. (P. Ex. 3, Rec. Vol. 8, p. 16.)

The order then states in considerable detail th general plan for making of sales and consistentl and completely requires the taking of every precau tion to insure a fair sale and realization of the fai value for properties at sales, such as any truste or fiduciary, realizing fully the responsibilities o the trust imposed upon him, would take. In eac case public accountants were to make an auditor' report showing the values of the properties no only for the information of the Custodian, but fo the benefit of prospective purchasers, and it is ex pressly stated that—

> Under no circumstances will any person i the employ, or connected with the organiza tion of the Alien Property Custodian, b permitted to bid for or purchase any prop erty, or be interested, directly or indirectly in any such purchase or in any corporatio or syndicate interested therein. (P. Ex. 3 Rec. Vol. 8, p. 21.)

In the course of carrying out this plan, it wa found in a considerable number of cases that th properties had been sold for what was considere less than a fair value thereof. The record dis closes numerous cases in which, on the order of th President, sales were set aside for the expresse reason that the purchase price was inadequate and, so far as the record in this case disloses, thes transfers to the Chemical Foundation constitut the only disposition of property made withou reference to value or without any attempt made t ascertain what the value might be.

Mr. Palmer, in his report to the President, in speaking of the legislative intent as expressed in the Trading with the Enemy Act, says:

> The Trading with the Enemy Act makes ample provision for the full protection of American citizens whose just claims or property rights may be affected by the administration of the Alien Property Custodian's office. Property in his hands is in *custodia legis* in a large sense, and the Government can be relied upon at the conclusion of the war to make adequate provision for the just disposition and distribution of all this property. (D. Ex. 30, R. Vol. 11, p. 2110.)

This language expresses the interpretation of the Act for which the Government now contends, and this language is directly in conflict with the theory, for the first time advocated upon the trial of this cause by the learned counsel for the appellee, to the effect that the Custodian, "If he saw fit to give the property away; if he saw fit to give these patents to the manufacturers of munitions or otherwise, it was clearly within the scope of that power, and he was to go untrammeled." Rec. Vol. 1, p. 820.)

In advocating the continuation of the liquidation and selling of enemy-owned business, Mr. Palmer says:

> Again, enemy property which is now being sold was all demanded and taken over by the Alien Property Custodian many

> months before the armistice was signed, and the jurisdiction of the Alien Property Custodian having attached there can be no legal reason why the signing of the armistice should operate to prevent the change of character of that property which is the only effect of the sale. *The proceeds, constituting the fair and adequate value of the property, are deposited in the Treasury of the United States and held for precisely the same uses as the property itself was held.* (D. Ex. 30, R. Vol. 11, p. 2116.) [Italics ours.]

There could be no clearer expression than this of the contention of the Government now being made. A substitution of the fair value of the property in cash for the property itself is what takes place whenever upon a foreclosure action or other proceeding property in the hands of the court is sold, free from liens, and the claims thereafter settled and paid out of the proceeds, or where a trustee, acquiring tangible property from a testator, sells the property and invests the proceeds in bonds or other securities, in which by law or by the terms of the will he is authorized to invest and reinvest. This construction gives full force and effect to the amendment of March 28, 1918, and still preserves intact the clearly expressed purpose of the Act, which was to leave for settlement after the termination of the war final disposition of the property.

The precise question now under discussion was, on June 14, 1919, formally ruled upon by Mr.

mer after he became Attorney General. (31 ns. Atty. Gen. 463.) The Secretary of War de- d to purchase from the Alien Property Cus- ian certain enemy-owned patents (including the ipp Gun Patents), and requested a ruling, first, ether the Government could acquire title, and, ond, whether the patents could be acquired for ominal consideration or whether the Govern- it would have to pay full value. This opinion en by an Attorney General who up to three nths before had been Custodian, who drafted amendment to section 12 of the act and had inistered it for one year, was written within months after the first and principal assign- it in this case was made, is too long to be ted in full, but the pertinent part thereof fol- s:

DEPARTMENT OF JUSTICE,
June 14, 1919.

SIR: I have the honor to acknowledge receipt of your letter of May 10, 1919, informing me that the War Department is considering the purchase of United States patent No. 923052, which is owned by the Krupp Co. of Essen, Germany, and which dominates a patent covering the split trail construction of the United States Model 1916, 75-m/m. field gun. You state that the Alien Property Custodian has been requested to seize this Krupp patent, and it is inferred that he has done so. You ask my opinion whether the Trading with the Enemy Act and its amend-

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ments authorize the Alien Property Custodian to sell this patent to the War Department acting for the United States either for a nominal consideration or for a fair and substantial consideration. You further ask me whether such a sale would deprive the Krupp Co. of such compensation as it would otherwise be entitled to for the use which the United States may already have made of its patent.

Under the Trading with the Enemy Act as originally enacted the Alien Property Custodian was vested with the powers of a common law trustee over property which came into his possession and had power to sell such property—" if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded." (40 Stat. 423, sec. 12.)

This language clearly did not authorize a sale for a nominal consideration.

Section 12 was amended by the act of March 28, 1918. (40 Stat. 460.) As so amended the Custodian remained vested by it with all of the powers of a common law trustee "and in addition thereto" was authorized in broad terms to manage and sell property which came into his possession as though he were the absolute owner. This power, however, was to be exercised under the supervision and direction of the Presi-

dent and under such rules and regulations as the President should prescribe, and it was provided that sales under the Act, except sales to the United States, should be made at public auction and after advertisement, unless the President should expressly otherwise determine.[1] The chairman of the Committee on Appropriations of the House of Representatives, in reporting the action of the conference committee which had recommended this amendment to section 12, stated this proviso was intended to safeguard the disposition of enemy property (56 Cong. Rec. 4083). As a part of the same act of March 28, 1918, the United States was authorized to acquire certain enemy property belonging beneficially to certain German steamship lines, and was expressly required to make just compensation therefor. Reading together the manifest intention of the original act with the amendment considered in the light of attending consequences, *I am of opinion that it was the intention of the Congress that any disposition by sale of property which comes into the possession of the Alien Property Custodian should be only at a substantial and fair consideration, the proceeds, of course, under other provisions of the Act being paid into the Treasury of the United States, there to await the further action of the Congress.* [Italics ours.]

[1] The President did by Executive orders, dated July 16, 1918, and December 3, 1918, make rules and regulations governing sales by the Custodian, but nothing contained in these alters the conclusions herein expressed.

In view of the express language of the act of March 28, 1918, I am of opinion that the Alien Property Custodian can sell any property, of which he becomes possessed, to the United States, but, as I have stated, *I think he can not sell it for a merely nominal consideration, but must require the payment of an amount which fairly represents the value of the property to so transfer it.* [Italics ours.]

* * * * *

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF WAR.

It is difficult to harmonize this opinion with the views expressed by Mr. Palmer as a witness in this case. In any event, to the extent that administrative construction of an Act has value in the Courts, this record should be conclusive.

6. All of the decisions which have been rendered under the Trading with the Enemy Act, or where that act has been called in question, have held the act to be not an act for the confiscation of enemy property but for the conservation of it, subject to further disposition by Congress

A number of decisions by various Courts have expressly stated that the act was not a confiscation measure. Some of these may be mere *dicta*, but the uniformity with which the courts have reached this result is extremely persuasive.

See:

Banco Mexicano v. *Miller et al.*, 289 Fed. 924.

Stoehr v. *Wallace,* 269 Fed. 827; affirmed 255 U. S. 239.

Kahn v. *Garvan,* 263 Fed. 909.

Mayer v. *Garvan,* 278 Fed. 27.

In re Greggs Est., 266 Pa. 189; certiorari denied 252 U. S. 588.

Biesantz v. *Royal Arcanum,* 106 N. Y. Misc. 545.

Techt v. *Hughes,* 229 N. Y. 222.

In each of these cases the Court declared that Congress had not by this statute adopted a policy of confiscation. We can find no case in which any court has ever suggested that this statute authorized or contemplated confiscation of enemy property, directly or indirectly, until the decisions of the lower courts in this case.

7. The construction given by the courts below would render the act unconstitutional

This point involves the discussion of Assignment of Error No. IX (Rec. Vol. 7, pp. 5053–5054), which is considered at this time in order to complete the discussion of the construction of the statute.

If an Act of Congress is susceptible of two constructions, one of which would render the Act unconstitutional and under the other it would be valid, the latter will be accepted.

Sinking Fund cases, 99 U. S. 700, 718.

Knights Templars Co. v. *Jarman,* 187 U. S. 197, 205.

United States v. *Delaware, etc., Co.,* 215 U. S. 366, 407.

Plymouth Coal Co. v. *Penna.*, 232 U. S. 531, 546.

If the construction of this Act adopted by the courts below be accepted, which construction is necessary to sustain the transactions in this case, then the Custodian, acting under the supervision and direction of the President, could, under a power of sale, transfer any property in his custody to any person or corporation which he might select, for no consideration or a nominal consideration, upon the ground that he thought it would promote the interest of American industry or otherwise serve the public interest. The District Court referred to such a transaction as a "devotion" of the property "to the public interest," which is but another way of saying that as to the owners it is a clear confiscation and as to the United States a donation of property in its custody and in which it has at least a contingent interest, to private industry as a subsidy. Aside from the fact that no authority for such a transaction can be found in the language of the Act, it would seem that had Congress attempted to vest any such powers in an executive officer the Act would have been unconstitutional.

Confiscation is in derogation of common right and of the uniform practice of civilized nations for two hundred years prior to the passage of the Act. The intent of Congress to effect this result, therefore, must be clearly and unmistakably expressed.

Murray v. *Charming Betsy,* 2 Cranch, 64.
Brown v. *United States,* 8 Cranch, 110.
Ware v. *Hylton,* 3 Dallas, 199, 254, 255.
Kent's Commentaries, Section 1 et seq.
Alexander Hamilton Camillus Letters Nos. XVIII, XIX.
Mrs. Alexander's Cotton, 2 Wall. 404.
Hanger v. *Abbott,* 6 Wall. 532.

President Wilson's statements:

Address to Congress, April 2, 1917. (P. Ex. 730, Rec. Vol. 10, p. 1979.)
Message to the Pope, August 27, 1917. (P. Ex. 731, Rec. Vol. 10, p. 2003.)
Address to Congress, December 4, 1917. (P. Ex. 730½, Rec. Vol. 10, p. 1991.)

The Trading with the Enemy Act did not provide for confiscation, or establish any machinery for that purpose. It provided for three steps or phases in dealing with enemy property.

(*a*) There was to be a seizure of the property either under order of the President or by voluntary surrender, all of which was provided for in Section 7.

(*b*) When the property was seized or surrendered it came into the possession and custody of the Custodian with power of administration and sale. The power of sale did not effect a disposition of the beneficial interest, but a sale only effected a change of form or character. It matters not what was the purpose of the sale, the legal character of the transaction is the same. These acts of administration, including sale, did

not in contemplation of law prejudice or affect the rights of the original owner in any way (*Garvan* v. *Shares of Stock,* 276 Fed. 206), and being acts of internal administration, did not as between the Government and the purchaser involve the war power any more than the administration of any other public property involves the war power.

(*c*) The third phase was the final disposition of the property after the war, which was expressly reserved for future legislation of Congress in section 12 of the Act. The exercise of this power and the accomplishment of this third and distinct phase of the matter necessarily required that the management and sales of this property should be so conducted as to have the property or its equivalent in law on hand after war for disposition as Congress might then determine and negatived any procedure which would operate as a confiscation or "devotion to the public interest," or any other "final disposition" of the beneficial interest in the property.

A sale of property of another by the Government under conditions which destroy its value, or a "devotion" of property "to public use" by taking assumed benefits to the public as consideration for the transfer, as both Courts below held was done in this case (Rec. Vol. 7, pp. 4914, 4918, 5025, 5026), is nothing but confiscation.

Smyth v. *Ames,* 169 U. S. 466.

Reagan v. *Farmers, etc., Co.,* 154 U. S. 362.

Chicago, etc., R. R. Co. v. *Minnesota,* 134 U. S. 418.
Knoxville v. *Water Co.,* 212 U. S. 1.
Minnesota Rate Cases, 230 U. S. 352, 434.
Houston v. *Southwestern, etc., Co.,* 259 U. S. 318.

No power could have been vested in executive officers to confiscate property in their discretion under our law for it would have involved a transfer to them of the political and legislative functions of Congress to determine upon confiscation and the property to be confiscated. The Act as so construed would have been clearly unconstitutional.

The Act as construed by the Courts below would also be unconstitutional in that it would have empowered the Custodian to confiscate the property of American citizens not having enemy status whose property was erroneously seized and transferred for nominal consideration or for no consideration as the Courts below held might be done. We do not deny that the Government may destroy the property of American citizens located in the military zone where such act is in their judgment necessary in the prosecution of war. We do not deny that it may seize the property of American citizens who by virtue of their residence or acts acquire the status of enemies, and deal with such property as enemy property. But the property of American citizens not "enemies," which

is located outside of the military zone, is under the protection of the Constitution as much in time of war as in time of peace.

United States v. *Lee,* 106 U. S. 190.
Floyd Acceptances, 7 Wall. 666.
Ex parte Milligan, 4 Wall. 113.
United States v. *Cohen Grocery Co.,* 255 U. S. 81.

It was inevitable that errors should be made in the seizure of property, under this act, and that the property of citizens entitled to such protection should be erroneously seized. Section 9 was inserted in the Act to give them their remedy.

Stoehr v. *Wallace,* 255 U. S. 239.

But when the power of general sale was given by amendment to section 12 it was recognized that property might be seized and sold without knowledge of the owner, although he was not an enemy. It was therefore provided by amendment to section 7 (c) that his rights should be transferred to the proceeds which were in law deemed the equivalent of the property. The courts have held that this provision made the act Constitutional for the reason that the proceeds of a fair sale would be in law the equivalent of the property taken.

Garvan v. *Shares of Stock,* 276 Fed. 206, 283 Fed. 746.

If, however, as held by the court, and was done in this case, property could be seized one day

and sold the next for a nominal consideration or for no consideration, or devoted to "the public use," then there would be nothing in the place of the property of nonenemies so seized and transferred. It would be a clear taking of private property without compensation in violation of the Constitution. (See authorities cited supra.)

This is exactly what took place in this case. Numerous instances were presented of the seizure and sale to appellee of patents of American citizens, non-enemies, without their knowledge. (Record Vol. 2, pp. 1061, 1062; Rec. Vol. 3, pp. 1531, 1532, 1570 to 1572; P. Ex. 209, Rec. Vol. 8, p. 498; P. Ex. 214, Rec. Vol. 8, p. 508; P. Ex. 487, Rec. Vol. 9, pp. 907 to 922.) In many instances the property was returned by the appellee, but if the transaction was valid there was no obligation to so do. An American citizen, while fighting for his country, might thus have his property taken and given away or "devoted to public use," and if the construction of the act by the courts below be sound he would have no redress. The Act as so construed would be unconstitutional.

When we come to consider the other aspect of this matter in the light of the conditions which have been reviewed, the invalidity thereof seems manifest.

The courts found in effect that the transaction was a devotion of the property to the public use even though thereby its monetary value for pur-

poses of sale was substantially destroyed, and tha
part of the consideration received by the Custo
dian was the establishment of this industry in th
United States. (Rec. Vol. 7, p. 5042.)

This was actually and in legal effect a grant o
subsidy or bounty of the property to the privat
firms and corporations owning the purchasing co
poration, and thus obtaining the beneficial owne
ship in and use of this property free from a
interest in or control of the same by the Unite
States.

We shall later consider whether this was
"public use." The first question is whether the
was or could have been authority vested in Execu
tive offices to make such a grant of a subsidy o
bounty at all.

This Court has indicated great doubt as t
whether Congress itself can grant a bounty o
appropriate public property for the promotion o
private commercial industry.

United States v. *Realty Co.*, 163 U. S. 427
United States v. *Carlisle*, 5 App. D. C. 138
Field v. *Clarke*, 143 U. S. 649.

The State Courts have held that legislatio
granting a subsidy to private industry is unconsti
tutional.

Michigan Sugar Co. v. *Auditor Genera*
124 Mich. 674, 83 N. W. 625.
Minnesota Sugar Co. v. *Iverson*, 91 Minn
30, 97 N. W. 454.

Oxnard Beet Sugar Co. v. *State,* 73 Nebr. 57, 102 N. W. 80.

People v. *Township Board of Salem,* 20 Mich. 452, 4 Am. Rep. 400.

But if such power is vested in Congress, it can only be exercised by Congress as a legislative function, and can not be delegated to or exercised by executive officers.

Field v. *Clarke,* 143 U. S. 649.

United States v. *Eaton,* 144 U. S. 687–688.

United States v. *Maid,* 116 Fed. 650.

United States v. *Blasingame,* 116 Fed. 654.

United States v. *Matthews,* 146 Fed. 306.

Since Congress could not delegate this legislative function (even though it was possessed by Congress) to Executive officers to grant the beneficial interest in this property as a subsidy to or for the benefit of private industry, or even to confiscate and appropriate or dedicate it to a public use, it would seem entirely immaterial whether the Custodian (or even the President) thought it was wise to do so or not. It was a question of authority or power in the *disposition* of property held by the Government, and the power to do this could not and did not exist in executive officers.

It must be clear that the Act did not seek to confer any such power. It *authorized a sale.* The orders under which the Custodian acted (as-

suming them to be valid) only authorized sales. Both Courts below held that these transactions were sales. (Rec. Vol. 7, pp. 4910, 4914, 5022.) Congress reserved for future legislation the disposition of the beneficial interest. Neither the Act nor the orders suggested or sought to confer any authority to grant subsidies or bounties to anyone, or to devote the property to "a public use," or a private use. The whole Act is a denial of any such purpose or power.

The fact that these patents were once owned by persons who were determined to be enemies gave the Government power to seize them under Act of Congress during war, and if they had been confiscated they would have become public property owned by the Government. This power could not be exercised for private benefit.

Miller v. *United States*, 11 Wall. 268.
Mrs. Alexander's Cotton, 2 Wall. 404.

The nature of the property was in no way changed by the seizure and custody. It remained private property in Government custody and subject to Government control.

But it would seem clear in any event that the transactions in question did not constitute a "devotion of the property *to public use.*"

A public use is a term clearly defined in law. It is a use which is governmental or *quasi* governmental in character, the latter being commonly illustrated in public service corporations. The

devotion of property to private commercial enterprise, however beneficial it may be to the country indirectly, is in no sense a public use.

Loan Assn. v. *Topeka,* 20 Wall. 655.
Cole v. *LaGrange,* 113 U. S. 7.
Kaukauna, etc., Co. v. *Green Bay, etc., Co.,* 142 U. S. 254.
Fallbrook District v. *Bradley,* 112 U. S. 155.

In the case of *Loan Association* v. *Topeka,* 20 Wall. 655, this question was fully considered: The city of Topeka issued bonds purporting to be payable to a bridge manufacturing and ironworks company of Topeka to aid and encourage that company in establishing and operating shops in the city of Topeka. The holder of certain of the bonds brought an action against the city of Topeka on interest coupons attached. In the opinion Mr. Justice Miller discusses the question involved and decisions at considerable length, and distinguishes cases sustaining the validity of bonds voted to aid the construction of railroads and similar enterprises on the ground that such corporations and their businesses serve a public purpose and were affected with a public interest.

In his opinion, at page 665, he says:

> But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not a public purpose, as we have

> been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

At another point in the same opinion (p. 664) it is said:

> To lay with one hand the power of the Government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

It would seem that further discussion of this question is unnecessary. The Custodian held this property as an officer of the Government to manage the same with power of sale until Congress should decide upon its final disposition. It was in his hands subject to control by the Government and subject to future legislation of Congress. He undertook under form of sale for a nominal con-

sideration to transfer the property from the present control and future action of Congress to a private corporation of which he was President and which was officered by his assistants. That corporation now seeks to hold this property against the Government and to justify this transaction on the ground that it was done to promote the dye and chemical industry, a purely private business, and that the property of that industry might be of benefit to the country. The same might be said of any industry.

We submit that this action was unauthorized by statute and void against the United States—

(1) Because Congress could not confer and did not undertake to confer upon the executive officers of the Government the power to confiscate this property, and this was first in effect a confiscation thereof.

(2) Because Congress could not confer, and did not undertake to confer, upon executive officers of the Government the power to grant this property as a subsidy or bounty for the aid or development of any commercial enterprise or industry, and that the attempted grant in this case was clearly a subsidy or bounty to promote or in aid of industry.

(3) That the Trading with the Enemy Act, as construed by the court on this point, would be clearly unconstitutional for reasons which have been discussed.

CONCLUSION ON POINT I

The construction of this Act contended for by the Government is in accord with the language of the Act, would give full force to the power of sale, accomplish to the fullest extent the intent of Congress, and would preserve this property or its proceeds representing the fair value thereof in possession of the Government for final disposition by Congress after the war, as the Act directs. It is supported by the legislative history of the Act, the administrative construction, the decisions of the courts, and the enlightened policy of this and other civilized nations. As so construed the Act would be constitutional.

The construction contended for by the appellee and adopted by the Courts below is not sustained by the language of the Act; it converts a simple power of sale given to a public officer in trust into a discretionary power of confiscation, and of donation or subsidy to private industry; it effects a final disposition of the property and defeats the express reservation of power to Congress to dispose of the property after the war. It is contrary to the legislative history and administrative construction of the Act and to the decision of every court which has passed upon the Act prior to this case. It would clearly render the Act unconstitutional.

It is submitted that the construction adopted by the Courts below is therefore erroneous, and

should be reversed; that since the transactions under review in this case were clearly unauthorized by and contrary to the Act as properly construed, they are unlawful and void as against the United States, and should be set aside; and that relief should be granted to the United States in accordance with the prayers of the bill.

Point II

The Court erred in holding that the alleged private sales were authorized by the orders of Frank L. Polk of February 26, 1919, and April 5, 1919; that the legal defects therein, if any, were cured by ratification of the President; and that the sales were made in accordance with said orders

This point involves a consideration of assignments of error, Nos. V and VI. (Rec. Vol. 7, pp. 5051, 5052.)

1. The Executive Order of December 3, 1918, seeking to vest in Frank L. Polk "all power and authority" to order private sales of property, which was vested in the President by Section 12 as amended, was unlawful and void

The sales and assignments involved in this suit were all private sales. The entire authority of the Custodian to sell property in his custody was contained in Section 12 of the Trading with the Enemy Act as amended by Act of March 28, 1918. This section, as amended, expressly required that all sales by the Custodian should be at public auction to the highest bidder after due advertisement, etc., "unless the President, stating the reasons therefor in the public interest, should otherwise determine."

It is conceded that this proviso gave the President authority to order private sales "stating the reasons therefor in the public interest."

The question here presented is whether this was lawfully done as to the private sales in question. If not, there was no authority to make private sales and the same were void for want of power through failure to comply with the conditions precedent in the Act.

United States v. *Jonas*, 19 Wall. 598.

It is admitted in this case that the President did not himself determine upon private sales of these properties. The appellee claims in its answer and the Courts below held that by the Executive Order of December 3, 1918, the President vested in Frank L. Polk the power and authority to determine upon a private sale of property under this Act by the Custodian, and to state the reasons therefor in the public interest. Mr. Polk was at that time Counsellor of the Department of State. It is admitted that the President did issue such an Executive Order of December 3, 1918 (Rec. Vol. 1, p. 547), and that Frank L. Polk by Orders dated February 26, 1919 (Rec. Vol. 1, p. 551), and April 5, 1919 (Rec. Vol. 1, p. 554), did undertake, for the reasons stated in said orders, to authorize the Custodian to substitute a private for a public sale of the respective properties in controversy. The question of law then arises as to whether this action of the President and of Frank L. Polk

was valid and lawful and operated to authorize a private sale of the properties.

It must, of course, be admitted that an act of an officer beyond the powers lawfully vested in him can not bind or estop the United States.

> *Hunter* v. *United States,* 5 Peters, 173.
> *The Floyd Acceptances,* 7 Wall. 666.
> *Humboldt* v. *Long,* 92 U. S. 642.
> *United States* v. *Alexander,* 110 U. S. 325.
> *United States* v. *San Jacinto, etc., Co.,* 125 U. S. 274, 307.

The principle is well stated in the case of *United States* v. *Jonas,* 19 Wall. 598, 604, upon a state of facts very similar to those in the case at bar. The court held the sale invalid, and at page 604 said:

> It is manifest, if any effect is to be given the act invoked by the solicitor as the basis of his authority, that he could not proceed at all without the approval of his superior. The legislation of Congress would be wholly ineffectual to prevent the evils which it was designed to remedy if this approval should not be treated as a substantial requirement, a thing essential to give validity to the sale. The question is one of power, and the power is given to sell when the Secretary thinks it advisable to do so. His approval is a condition precedent without which the solicitor has no authority whatever to act.

The General rule with respect to the delegation of powers vested in a public officer or agent is so

well settled that it does not require extended
cussion or citation of authorities. In *Sug*
on Powers, page 266, the principle is stated
follows:

> So, wherever a power is given over rea
> personal estate, and whether the execut
> of it will confer the legal or only the eq
> able right on an appointee, if the power
> pose a personal trust and confidence in
> donee of it to exercise his own judgm
> and discretion, he can not refer the powe
> the execution of another.

This is a Government of limited power, and
officers of the Government are only agents of
law for the exercise of the powers granted
them. The extent and limit of their powers
fixed by law.

> *Floyd Acceptances,* 7 Wall. 666, 676.
> *U. S.* v. *Lee,* 106 U. S. 196, 220.
> *Ex parte Milligan,* 4 Wall 113.

Executive powers are divided into seve
classes. There are political powers, which
President is required by the Constitution or by
law to exercise, and which he can exercise in p
son, or to a limited extent (where the exercise
personal discretion is not required) through
appropriate offices of the Government created
Congress as provided by the Constitution. Wh
so exercised, the acts of such offices are deemed
acts of the President himself. There are admin
trative powers which may be exercised in the sa

way. But there are certain other powers as to which a personal trust is imposed in the President, and a personal discretion or judgment is to be exercised by him. With respect to these powers the President is required to determine in his own opinion or in his own judgment when the power shall be exercised, or to determine certain facts requiring his personal act. Such powers can not be delegated.

In the leading case of *Martin* v. *Mott*, 12 Wheat. 19, 30, the Supreme Court, in referring to a discretionary power of this kind, says:

> Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of said facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

In the case of *Runkle* v. *U. S.*, 122 U. S. 543, 557, the Supreme Court says:

> Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would

have been in passing on the case if he had been one of the members of the court-martial itself.

To the same effect see:

Anderson v. *Crawford,* 265 Fed. 504–506
United States v. *Page,* 137 U. S. 673.
United States v. *Fletcher,* 148 U. S. 84.
Coquard v. *Chariton County,* 14 Fed. 203

The difficulty, if any, arises in the application of this settled principle. Applying the rule stated by the Supreme Court in *Martin* v. *Mott,* it seems clear that the power given to the President to determine upon a private as distinguished from a public sale was intended as a safeguard to the interest of the United States and any other person interested in this property; and that the exercise of the discretion there given, to determine upon a private sale, guarded by the unusual provision that he must state his reasons therefor in the public interest was only to be exercised by him personally, and to rest upon his personal judgment. The history of the Act, the surrounding facts and circumstances at the time of its enactment, and the contemporaneous construction thereof by the President himself conclusively sustain this view. (See discussion, ante, pp. 48 to 91.)

Senator Underwood, in charge of the bill, in the discussion of March 11, 1918 (D. Ex. 32, Rec. Vol. 11, p. 2264), expressly states that this provision "will require the personal act of the President"; that the policy of Congress was to require public

sales, but that this amendment gave the Custodian the right "in exceptional cases to appeal to the President to allow a certain portion of such property to be sold not by public auction but by negotiation."

Again on March 28, 1918, Mr. Underwood, in discussing this provision immediately before the passage of the Act, says (Rec. Vol. 7, p. 4872):

> The personal action of the President is required to accomplish that result and he is required to give in writing his reasons therefor. It seems to me clear that there ought to be that opportunity under the Act. Cases may arise when you can not reach the desire of the Government to protect this property or the desire of the Government to take it away from an alien enemy by public sale, and if the President of the United States, *acting himself and not through an agent,* determines that it is necessary to be done, and in writing gives his reasons for doing so, it seems to me that is ample protection to the public and to the property. (Italics ours.)

It is a rule of construction that where there is doubt as to the meaning of an act, the contemporaneous construction thereof by the executive officer charged with the duty prescribed in it will be given great weight, and in the absence of clear error will be accepted by the courts.

U. S. v. *Moore,* 95 U. S. 760.
Hahn v. *U. S.,* 107 U. S. 402.
Brown v. *U. S.,* 113 U. S. 568.

The record in this case shows that under the authority given by the provisions of Section 5 of said act the President exercised through various executive offices or departments of the Government substantially all of the administrative powers conferred upon him. But from the passage of this Act in March, 1918, down to December 3, 1918, when he was leaving for Paris, although he was carrying the burdens of a great war, he exercised this particular power of determining upon a private sale personally, and every executive order authorizing a private sale from March until December (there were a number) is signed by the President personally. These orders are in the Record. (P. Exs. 685 to 726, Rec. Vol. 10, pp. 1759 to 1873.) The power was exercised by him with great caution and very sparingly. (Statement of Ferry in conference of January 27, 1919, P. Ex. 28, Rec. Vol. 8, p. 85 at 89.)

Standing, therefore, on the nature and purpose of the power granted, the language of the statute illumined by the statement of the able Senator in charge of the bill, accepted by the Senate and confirmed by administrative construction of the President himself, the government contends that this delicate and discretionary power of ordering a private sale of property in the custody of the United States to await final disposition by Congress was a power personal to the President and could not be delegated to another person. Judge

Buffington so held in his concurring opinion in this case. (Rec. Vol. 7, p. 5044.)

2. The contention that Section 5 of the Act authorized this delegation of power

Section 5 of the Act (40 Stats. 411) after conferring certain powers upon the President, provides that "the President may exercise any power or authority conferred by this Act *through such officer or officers* as he shall direct." (Italics ours.) This language was in the original act and if there is any conflict between this provision and the amendment the amendment will of course control. They must be read together and effect given to the intent of Congress.

Alexander v. *Alexander,* 5 Cranch, 1.
Stockdale v. *Freeman,* 3 How. 556, 564.
Cope v. *Cope,* 137 U. S. 682, 688.
New York, etc., R. R. Co. v. *Peninsular Exchange,* 240 U. S. 34.

But we do not think there is any conflict between the two. The language of Section 5 must be held to refer to powers which in their nature are capable of exercise "through" another. The very terms of the amendment to Section 12 excludes the power given to the President from this class.

It is contended, and the majority of the Court of Appeals held (Rec. Vol. 7, p. 5037), that the power of the President to exercise his powers under the Act through others has been sustained by this Court.

Central Union Trust Co. v. *Garvan*, 254 U. S. 554.

Stochr v. *Wallace*, 255 U. S. 239.

That is true as to the power to determine when the owner of property was an "enemy," as defined in the Act, and to seize property under Section 7. The President exercised these powers through the Custodian, and this was sustained. But these powers were purely administrative and involve no exercise of personal judgment or discretion. Congress defined an "enemy" under the Act.

The situation here is entirely different. Congress did not undertake to say that any private sales should be made or to define the circumstances under which they might be made in any particular case. The discretion as to whether a private sale should be made at all, what property might be sold privately, when and under what circumstances this might be done, subject always to the provisions of the law, was all left to the discretion of the President. He was required to state "the reasons therefor in the public interest." This required an exercise of the personal judgment of the President and a statement of his reasons (not those of another) for his act. This was by its very nature a power and discretion which could not be delegated to or "vested" in another.

It should further be observed that Section 5, even if it has any application, did not authorize

a delegation of executive power as was sought to be done in this case.

Section 5 of the Act provided that the President might "*exercise*" the powers under the act "*through* such *officer* or *officers* as he shall direct."

By Section V of the Order of December 3, 1918, drawn by the Custodian (Rec. Vol. 4, p. 2575) and signed by the President, it was provided:

> *I hereby vest in Frank L. Polk all power and authority* conferred upon the President by the provisions of Section 12, etc. (Rec. Vol. 1, p. 547 at 549.)

There is a wide difference between exercising a power "through" another and "vesting" all power under a statute in another. The President necessarily exercises many of his administrative powers through Cabinet Officers and others, and their acts in such cases are directly under his supervision and become in law his acts. When, however, he undertakes to "vest" in Frank L. Polk "all power and authority" vested by Congress in the President by Section 12 of the Act as amended, which included not only the power of deciding upon and ordering private sales under the amendment, but the power of supervision and direction of the Custodian, he necessarily divested himself of these powers, if the order was valid, and transferred them to Mr. Polk, to be exercised by Mr. Polk in his discretion. It seems clear, therefore, that even if the power given to the President in Section 5 of the Act has any reference to a

power requiring the exercise of his personal judgment and discretion and the statement of his own reasons, yet the order of December 3, 1918, was not in conformity with Section 5 of the Act, for the reasons stated, and was clearly unauthorized by law.

There is another very serious objection bearing directly upon the legality of this order. The President exercises many of the administrative functions of his office through other officers of the Government. But before they can discharge these duties they must be officers and must take an oath of office faithfully to discharge the duties of the particular office. They act as officers, not as persons, for this is a "government of laws, not of men." The duty is imposed upon the office, not the man. The man may resign or die, but the office continues with the duties attached thereto. This has always been recognized as fundamental in our Government.

The order of December 3, 1918, drawn by Mr. Palmer and signed by the President just before he left for Paris, is the first and only instance in the history of this government, so far as we can find, where the President undertook to "vest" a power conferred upon him by law in an individual by name, and without any reference to the office.

The distinction between a power conferred upon (as distinguished from "exercised through") an *officer,* and a power conferred upon a *person* is

obvious and has frequently been emphasized by the Courts. For instance, a power conferred upon the office of executor or trustee as such survives the death or resignation of the person occupying that position and may be exercised by his successor, while the same power conferred upon a person by name, who may be executor or trustee, falls upon the death of such person and can not be exercised either by his successor or by a Court of Chancery.

Partie v. *Thomas et al.*, 11 Fed. 769.
Doe v. *Ladd*, 77 Ala. 223.
Security Co. v. *Snow*, 70 Conn. 288, 66 Am. St. Reps. 107.
Simmons v. *McKinloch*, 98 Ga. 733, 76 S. E. 80.
Woodwards Estate, 8 Phila. 211.
Young v. *Young*, 97 N. C. 132.
In re Bierbaum, 40 Hun, 504.
Kiplinger v. *Macubbin*, 58 Md. 203.

The fact that Mr. Polk happened to be counsellor of the Department of State at the time is entirely immaterial. The power was not vested in the officer, but in the man. If he had resigned next day, he could still have acted under the order. If these powers were vested in him they are, so far as this record shows, still vested. His successor could not have exercised these powers. The office had nothing to do with it. The powers mentioned were not sought to be exercised through that officer as such, but assigned to or "vested" in the person. They were not inci-

dent to the office. They were not delegated to the office. They were not covered by the oath of office. They were sought to be vested in him personally and by name, entirely outside of the office he happened to hold. They sought to divest the President, as an officer, of these discretionary powers vested in him by Congress to be exercised by him as its Agent, and "vest" them completely in Mr. Polk as a person, and make him, without any oath of office or official responsibility with respect thereto, the agent of Congress in lieu of the President for the exercise of the delicate and discretionary powers of government. There was no authority in the Statute or in law for such action. Under the Constitution and laws of the United States it simply can not be done.

But assuming for the sake of the argument that the provisions of the Executive Order of December 3, 1918, operated to "vest" in Mr. Polk "all power and authority" conferred upon the President under this provision of Section 12, yet the orders of Mr. Polk of February 26, 1918, and April 5, 1918, under alleged authority of which the pretended sales were made, are void as being unauthorized by and in conflict with the Statute. If the Order of December 3, 1918, was valid it substituted Mr. Polk for the President as Agent of Congress to execute, in his discretion, the powers conferred upon the President by this section. His orders must, therefore, be in conformity with the Statute. If these

powers were conferred upon Mr. Polk he certainly could not confer them upon the Custodian, since they were conferred by Congress as a limitation upon the action of the Custodian. If, in turn, they were vested in the Custodian the effect would have been to repeal this provision of the Statute by order of the officer who was required to execute it.

Under the Statute the President was authorized to determine upon private sale, and required to state "the reasons therefor in the public interest." In doing this it was necessary to the validity of such sale under this Statute that he determine (1) what property was to be sold privately so that it might be seen whether the order was complied with or exceeded; (2) to state the reasons or purposes "in the public interest" upon which his decision was based. If these reasons were based upon alleged facts which were nonexistent, then the authority would fail. We refer not to the wisdom of the reasons given or the propriety of a sale at all, but to the existence of the facts upon which the act was predicated. These principles are elementary.

United States v. *Barlow,* 132 U. S. 271, 280.

Hume v. *United States,* 132 U. S. 406.

Whiteside v. *United States,* 93 U. S. 247, 257.

Moore v. *Robbins,* 96 U. S. 530.

Steele v. *United States,* 113 U. S. 128, 134.

Let us examine the orders of Mr. Polk in the light of the statute and of these principles. The pertinent language is identical in both orders. (Rec. Vol. 1, pp. 551, 554.) The order provides that the Custodian may sell the property mentioned on "such terms and conditions" as to him or his authorized agent "may seem proper." Mr. Polk authorizes a private sale and leaves all the "terms and conditions" to be determined by the Custodian "or his authorized agent" as to him or such agent "may seem proper." The limitations imposed by Congress upon the sales of this property in the custody of the United States are gone and the Custodian is free to do what he pleases. This was not a compliance with the Act. It certainly would not be sustained as to a private trust.

The power of determining upon a private sale as an exception to the rule of public sales established by the Act necessarily involved a determination of what property was to be sold privately. This is self-evident. If the President had undertaken in the face of this statute to authorize the Custodian to sell privately "at such place and upon such terms and conditions" as he saw fit all of the manufacturing plants or all of the stocks and bonds which were seized under the Act, we do not believe anyone would attempt to sustain the validity of such an exercise of power under this Statute. Yet that is exactly what Mr. Polk undertook to do as to all property the seizure of which was authorized by

the Amendment of November 4, 1918. The orders purport to authorize the Custodian to sell privately all patents and similar rights described which the Custodian "*may seize* or *may have seized* under the provisions of the said Trading with the Enemy Act and *amendments thereto now or hereafter enacted,* and which *he* from time to time shall determine relate to the objects and purposes of said The Chemical Foundation, Incorporated, as expressed and defined by its charter." When we turn to the charter of the Foundation (Rec. Vol. 1, p. 90), which Mr. Polk testifies he never saw (Rec. Vol. 2, p. 1196), we find that it is that of a commercial corporation with "all the powers conferred by the laws of the State of Delaware upon business corporations, it being hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner such general powers"; and with power to do the things set forth therein, "to the same extent and as fully as a natural person might do" (Rec. Vol. 1, p. 92). It follows that the Custodian could very properly under the order of Mr. Polk have determined that every enemy-owned patent in the United States related to the "objects and purposes" of the Foundation as "expressed and defined by its charter," and could have sold all or any of them privately at "such place and upon such terms and conditions" as to him or his authorized agent might "seem proper."

We thus have a case in which Congress careful guarded the power of sale given to the Custodi by making it subject to the "supervision a direction of the President" and requiring publ sales in all cases, except where the Preside should otherwise determine, and requiring ev the President to state "the reasons therefor in t public interest"; the President undertook "vest" all of this "power and authority" in M Polk; Mr. Polk, in turn, undertakes to vest th power as to the essential elements of the dete mination of the property to be sold privately, t place and terms and conditions of private sale, i the Custodian whose powers were intended to b limited by these very provisions. As to this gre mass of property, the seizure of which had onl been authorized by the Amendment of Novembe 4, 1918, the extent and value of which was entirel unknown, the essential provisions of Section 12 o the Act imposing strict limitations upon the powe of sale of the Custodian were as effectively re pealed as if they had been wiped from the Statut books.

We next come to the facts stated by Mr. Poll in his order as the basis of his "reasons therefo in the public interest."

The basic "reasons in the public interest" stated in the order (Rec. Vol. 1, p. 553) and tes tified to by Mr. Polk (Rec. Vol. 2, pp. 1259 and 1260; pp. 1200 and 1201) were that the Foundatio

was incorporated for the purpose of holding patents, etc., "as a trustee for American industry," etc.; that it was "obligated" to grant "non-exclusive licenses upon equal terms and at a uniform royalty to qualified American manufacturers"; and "empowered" to grant free licenses to the United States "for any use the United States might desire to make of the inventions," etc.

Aside from the fact that the patents, etc., when seized were held in trust by the United States exactly on the conditions stated, let us see what were the facts.

As to the Foundation taking the patents as "trustee for American industry" it need only be said that the expression is a legal absurdity and creates no enforceable obligation of any kind. If it was intended to create or imply a trust it was absolutely void.

Wheeler v. *Smith,* 9 How. 55.

Kain v. *Gibbony,* 101 U. S. 362.

Tilden v. *Green* (Tilden will case), 130 N. Y. 29.

Board of Foreign Missions v. *McMaster,* Fed. Cases No. 1586.

Morice v. *Bishop of Durham,* 10 Vesey, 521.

Attorney General v. *Aspinwall,* 2 Mylnor, C. 613.

Wicker v. *Hume,* 14 Beav. 509.

Story Eq. Juris, 14th ed. Vol. 2, Sec. 1332; Vol. 3, Sec. 1446.

Perry on Trusts (5th ed.) Sec. 697, p. 326.

As to the Foundation being "obligated" by its charter to grant licenses on equal terms, etc., to American manufacturers, we need only turn to the charter (Rec. Vol. 1, p. 91) to see that there is no such "obligation." On the contrary the charter expressly provides that—

> The board of Directors may refuse to issue any license or may revoke any license granted by the corporation and may prescribe the terms and conditions of said licenses.

No comment seems necessary.

As to the granting of licenses to the United States, it may be observed that the United States had the patents when seized. So far from the corporation granting free licenses to the United States "for any use the United States may desire to make of the inventions," the provision of the charter quoted above expressly negatives this statement, while Section (b) of the charter expressly provided that the corporation might grant non-exclusive licenses to the United States "upon such terms as the Board of Directors may determine."

Then to remove the possibility of any claim being made in future that anything in the order of Mr. Polk or the charter of the corporation imposed any obligation or limitation as to the use and enjoyment of these properties in the conveyance made on April 10, 1919, covering the larger part of the patents, etc., and in some of the subse

quent conveyances, all of which were executed by Mr. Garvan as Custodian to a corporation of which Mr. Garvan was president, the grant was made "without any reservation or qualification whatsoever, whether by reason of anything contained in the charter or by-laws of the said The Chemical Foundation, Inc., or otherwise." (See instrument of grant, Rec. Vol. 1, pp. 404, 408.)

These are the bald facts taken from the written documents. They speak for themselves. These orders were drawn by the Custodian and sent to Mr. Polk. He testifies that he knew nothing of the facts, that he never saw the charter of the corporation. (Rec. Vol. 2, p. 1196.)

For the reasons stated and discussed herein it is submitted (1) that there was no lawful authority in Mr. Polk to make the orders which are vouched in the answer as authority for the alleged sales, and (2) that had he possessed this power the orders would be and are void (*a*) as being unauthorized by and in violation of the statute, and (*b*) predicated upon a clear mistake of the essential facts.

3. The alleged ratification of the Polk orders by the President

In a concurring opinion Judge Buffington, of the Court of Appeals, sustained the contention that the power of ordering a private sale given to the President by Section 12 imposed a personal trust and duty on the President which could not be delegated, and that the effort to vest these powers in

Mr. Polk was "without warrant of law," but also held that the orders of Mr. Polk attempting to authorize these sales were ratified by subsequent acts of the President. (Rec. Vol. 7, p. 5044.) We shall now examine this position.

No law is better settled than that the act of an officer or agent, or one purporting to act as an officer or agent, of the United States, done without "warrant of law," to use the words of Judge Buffington, or contrary to law, is absolutely void as against the United States.

Ex Parte Milligan, 4 Wall. 113.
Floyd Acceptances, 7 Wall. 666.
United States v. *Lee,* 106 U. S. 192.
United States v. *Jonas,* 19 Wall. 598.
Prosser v. *Finn,* 208 U. S. 67.
Waskey v. *Hammer,* 223 U. S. 85.
Ewert v. *Bluejacket,* 259 U. S. 129.

It is equally well settled that while a voidable act may be ratified an act which is void is incapable of ratification. This is upon the simple and incontrovertible principle that an act which is void is not an act at all in contemplation of law, and does not exist, and that which in the eyes of the law was not an act or does not exist can not be brought into existence by ratification. There is nothing on which ratification can operate. It requires entirely new authority and an entirely new act of performance under that authority.

United States Bank v. *Owen,* 2 Peters, 527.

Miller v. *Ammon,* 145 U. S. 421.
Insurance Co. v. *Hull,* 51 Ohio State, 270.
Shippey v. *Eastwood,* 9 Ala. 198.
Shenk v. *Phelps,* 6 Ill. App. 112.

If, as we contend for the reasons already stated, and as Judge Buffington held, the authority sought to be conferred on Mr. Polk by the order of December 3, 1918, was without "warrant of law" and void; if the Polk orders based on that order were also void; if the sales made on the alleged authority of the Polk orders were also void, all of which would necessarily follow; and if a void order or transaction of an officer or agent of the United States is incapable of ratification, as is clearly the law on principle and authority, then it is difficult to see how the question of ratification comes into this case at all.

Assuming, however, that these orders of Mr. Polk were capable of ratification, it is submitted that there is in the record no adequate evidence to support a ratification thereof by the President. On principle and authority it is clear that in order to establish a ratification by an officer of the United States, the party claiming it must show (1) that the act was capable of ratification; (2) that there was power in the officer whose ratification is claimed to ratify; (3) a knowledge of the facts on the part of the officer whose ratification is claimed; (4) some adequate act of ratification by such officer; and (5) an intention

to ratify. The failure to show any of these essential elements defeats the claim of ratification.

Steele v. *United States,* 113 U. S. 128, 134.
Marsh v. *Fulton County,* 10 Wall. 676, 684.
Williamson v. *Berry,* 8 How. 495.
Davies County v. *Dickinson,* 117 U. S. 657.
Williams v. *Vreeland* (C. C. A. 3d Ct.), 244 Fed. 346, 350.
Doon v. *Cummings,* 142 U. S. 366, 376.
Norton v. *Shelby County,* 118 U. S. 425, 451.
Kelly v. *Milan,* 127 U. S. 139, 150.
Wardens v. *Church of Redeemer,* 45 Barb. (N. Y.) 356.

There are three matters in this record on which the claim of ratification is based.

The President by executive order of December 3, 1918, had undertaken to vest in Mr. Polk the power given by the act to order private sales of property. He was absent from the country until the 25th of February, 1919. He again left the country on March 5, 1919, and did not return until early in July of the same year. (P. Ex. 106, Rec. Vol. 8, p. 297.) The orders of Mr. Polk were signed on the 26th day of February, 1919 (Rec. Vol 1, pp. 551–553), and the 5th of April, 1919 (Rec. Vol. 1, pp. 554–557), respectively. At the time that the first order was entered, it does not appear that the President had any information on the subject.

The report of Mr. Palmer, as Custodian, to Congress for the year preceding, which described the sale of these patents as an accomplished fact (D. Ex. 30, Rec. Vol. 11, p. 2098 at pp. 2180–2183), (although none of the patents had then been seized and no sale had been made) was delivered at the White House on the 27th of February, 1919 (Rec. Vol. 2, p. 910), and forwarded by the President to Congress on March 1, 1919 (P. Ex. 14, Rec. Vol 8, p. 59). It was prepared before the first order of Mr. Polk was signed and was transmitted by letter dated February 22, 1919. (P. Ex. 13, Rec. Vol. 8, p. 58.) It could not have conveyed any information as to the orders of Mr. Polk, the first of which was not made until February 26, 1919.

Mr. Palmer testified (Rec. Vol. 4, pp. 2625 to 2636) that he discussed the sale of these patents with the President on the evening of March 3rd, 1919.

The President does not seem to have expressed himself as to the transaction, and he certainly took no action in the matter. The Statute required that if he authorized a private sale he must state his reasons therefor in the public interest. At that time only very few of the patents had been seized and only one of the orders of Mr. Polk had been signed. It does not appear, therefore, that the President gave the matter any consideration or that he ratified or attempted to

ratify any action taken in connection therewith or to do anything else about it.

The other basis of this claim is an order of the President signed February 13, 1920. (Rec. Vol. 1, p. 557.) Some question had been raised as to whether the orders of Mr. Polk were broad enough to authorize a valid conveyance of rights of action as to, and rights to, receive royalties under licenses of these patents issued prior to sale. To meet this situation the General Counsel of the Foundation prepared an Executive Order and further assignment covering these rights and sent them to Mr. Garvan, who was both president of the Foundation and Custodian, to obtain the signature of the President to the order, and then himself to execute the assignment as Custodian. The matter was the subject of much correspondence between the two offices. (P. Ex. 137, Rec. Vol. 8, p. 331; P. Ex. 149, Rec. Vol. 8, p. 343.) On February 11, 1920, Mr. Garvan sent this order to the President, with a personal letter to his Secretary requesting him to get the President's signature thereto. The President had been ill since September, 1919. (P. Exs. 146, 146a, and 147, Rec. Vol. 8, pp. 341 to 343.) The President's signature to the order was obtained on February 13, 1920. (P. Ex. 149, Rec. Vol. 8, p. 343.)

This order recited in the preamble the making of the orders of February 26, 1919, and April 5, 1919, by Mr. Polk, and the doubt as to whether

these orders authorized a conveyance of certain rights, and then authorizes the Custodian to sell to the Foundation "choses in action, rights, interest, and benefits, under agreements including rights to receive money by way of royalties or otherwise as compensation for use of patents," etc. It then provides that in case of sales theretofore made of "any property *which he is hereby authorized to sell,*" but as to which his authority to sell "may be deemed doubtful," he is authorized to ratify the sales.

There is here no suggestion of ratification of the Polk orders. So far as the record shows, the President never saw them. He was not asked to ratify them. He exercised no judgment or discretion as to these orders or authorizing a sale of the patents and other properties covered thereby. The order is carefully confined to authority to transfer certain intangible rights, including the right to receive royalties under existing agreements. That is all the authority it sought to give, all the property to which it related. If the Polk orders were valid they needed no ratification; if they were void the patents were in law still in the custody of the Government. The President did not undertake to act on that or to authorize any sale of these properties. Had he been asked to do so, he might have called for the facts. As it was, his order had no relation to the properties themselves. He did not attempt and clearly did not intend to ratify the alleged authority to sell these

patents or other properties, or to ratify any order of sale or anything else, except as to the rights to which the order was by its terms strictly limited.

For the reasons herein stated it is submitted that the decision of the lower courts holding that private sales of the patents and other properties involved in this suit were lawfully authorized under the Act was erroneous and should be reversed.

4. Even if the orders of Mr. Polk were lawful and valid, they did not authorize the sales or transfers of this property as made in this case

In the present discussion we shall only consider these transactions in their relation to the authority to make the same, alleged to have been granted by the orders of Mr. Polk, and endeavor to show that even if these orders gave to the Custodian lawful authority to make private sales, they did not authorize or attempt to authorize the sales as actually made.

It is, of course, elementary that where a trustee or an officer of the United States is authorized to sell property in his custody he must conform strictly to the authority given or the sales will be void as against the beneficiary of the trust or the United States.

Thatcher v. *Powell,* 6 Wheaton 119.
United States v. *Jonas,* 19 Wall. 598.
Steele v. *United States,* 113 U. S. 128.

The orders of Mr. Polk did contain certain specific and basic conditions upon which the alleged authority to make the sales or transfers of

the properties was predicated. They are stated as the basis of the "reasons" in "the public interest" for making private sales. Let us see how far they were complied with.

The first was that the Foundation was to hold these properties as "trustee for American industry" and the authority to sell was predicated upon this obligation being in the charter. Mr. Polk testifies that he understood that the transaction was in pursuance of a policy of turning over these patents "to the government or semigovernmental agencies," and although he had not seen the charter he regarded the Foundation as "a semigovernmental agency." (Rec. Vol. 2, p. 1256.) The corporation to which the sale was made as actually organized was not a "semigovernmental" agency; it was an ordinary commercial corporation with the broadest powers, in no way connected with the United States Government or under its control or supervision. (See Charter, Rec. Vol. 1, p. 91.) It could make free use or disposition of its property, its charter could have been amended, or it could have been dissolved at any time and the patents, etc., sold or distributed to its stockholders, the dye and chemical manufacturers, in its discretion, subject only to the laws of Delaware. The only reference to any "fiduciary capacity" as to this property was the expression of a purpose which could have been changed the next day, created no obligation and was too indefinite for enforcement if it had

done so. Then, to remove any possible doubt about it, the Custodian making the sale under these orders in the first assignment of April 10, 1919, covering substantially all the patents, etc., made to the corporation of which he was president, expressly provided that sale and grant was made to that corporation "without any *reservation or qualification whatsoever* whether by reason of *anything* contained in the *charter or by-laws of said The Chemical Foundation, Inc., or otherwise.*" (Rec. Vol. 1, p. 408.) [Italics ours.]

The same provision was inserted in all of the subsequent assignments until it was discovered by one of the counsel for the Custodian, not connected with these transactions, about a year later, when on his insistence it was dropped in later instruments. (P. Ex. 143, Rec. Vol. 8, pp, 338–339.) But substantially all of these properties had then been conveyed and with this provision in the grant.

The next condition upon which Mr. Polk acted and which was inserted in his order was that the Foundation was "obligated" to "grant non-exclusive licenses upon equal terms at a uniform royalty to qualified American manufacturers." (Rec. Vol. 1, p. 551 at 553.) Aside from the difficulty of deciding who was "qualified" the charter of the corporation as organized contained no such "obligation." (Rec. Vol. 1, p. 91.) It provided that "the corporation *may* grant non-exclusive licenses only * * * upon reasonable

and equal terms and without advantage as between licensees," etc., and then provided that—

> The board of directors may refuse to issue any license or may revoke any license granted by the corporation, and may prescribe the terms and conditions of said licenses.

Then to remove any possible "obligation" on the subject and allow them to amend their charter or do anything they saw fit, the assignment or grant of the property made by the Custodian contained the remarkable provision quoted, that the patents and other properties were conveyed "without any *reservation* or *qualification* whatsoever, whether by reason of anything contained *in the charter or by-laws* of said The Chemical Foundation, Inc., *or otherwise.*" [Italics ours.]

The only other provision of the orders which we shall consider in this connection is the condition stated therein that the corporation was "empowered" to grant free licenses to the United States "for any use."

Mr. Polk testified to the effect that he understood that the United States should have *free* and "unrestricted" licenses "for any use." (Rec. Vol. 2, pp. 1204, 1260.) The charter of the corporation as organized provided that the corporation "*may* grant *nonexclusive* licenses only * * * to the United States *upon such terms as the Board of Di-*

rectors may determine" [Italics ours], and the followed the further provision giving the board directors complete power to grant or refu licenses and fix the terms and conditions of a licenses. (Rec. Vol. 1, p. 91.) This was then fo lowed by the provision in the instrument of a signment making the grant "without any *reserv tion* or *qualification* whatsoever, whether by reas of anything contained *in the charter or by-laws* said The Chemical Foundation, Incorporated, *otherwise.*" (Rec. Vol. 1, p. 408.)

It was and will be contended by appellee th these sales were also ratified by the President, f there is a pathetic persistence in the effort to u the President as a screen for all of these transa tions. The answer is simple and brief. Asi from the principles already discussed, that voi acts are incapable of ratification, the power making sales was not vested in the President. H was empowered to determine upon and authori private sales. He could not ratify that which h had no power to do.

Marsh v. *Fulton County,* 10 Wall. 67 684.

Williamson v. *Berry,* 8 Howard, 495.

Davies County v. *Dickinson,* 117 U. 657.

Doon v. Cummings, 142 U. S. 366, 376.

But even if he had the power, there is no color ground for claiming that he ratified these sal as made in violation of the orders of Mr. Pol

The report of Mr. Palmer as Custodian, the conversation of Mr. Palmer with the President on March 3, 1919, from which it is claimed that the President derived knowledge of this plan, all occurred before the second order of Mr. Polk was made; before but very few of the patents were seized; before the organization of the corporation was effected; and before the first assignment of April 10, 1919, and all subsequent assignments were made. He certainly could not then have been told of the manner in which the sales were subsequently conducted.

The record does not indicate that the President, or Mr. Polk either, for that matter, ever heard of the manner in which these transactions were carried out.

As to the Executive Order of February 13, 1920 (Rec. Vol. 1, p. 557), it was by its terms limited to rights of action, and rights to receive royalties under prior agreements seized and transferred by the Custodian. The authority to ratify was strictly limited to these rights, as to which authority to sell was deemed doubtful, and had no reference whatever to the properties themselves. Even if the President could be held to have ratified the Polk orders, which for the reasons already stated we controvert, he certainly could not ratify and did not attempt to ratify or authorize the ratification of these sales made *in violation and negation of these orders,* and of which he had no knowledge or means of knowledge.

It is submitted, therefore, that there was no law
ful authority for the alleged private sales of thes
properties; that the alleged sales as made were n
in conformity with and were in direct violation
the orders claimed as authority therefor; and th
the same were void as against the United State

Point III

**The sales and assignments to appellee were illegal a
void, as being in violation of section 41 of the Cri
inal Code of the United States and of those princip
of law and equity which forbid a public officer
fiduciary making sale of trust property in his custo
to himself or to a corporation of which he is t
head**

This point involves a discussion of the issu
raised by Assignments of Error III and IV (Re
Vol. 7, pp. 5050 and 5051) and part of Assig
ment of Error VII (Rec. Vol. 7, pp. 5052 a
5053).

Rules of law and principles of equity as o
as our jurisprudence, and established by a lo
line of decided cases, forbid a public officer
trustee making a sale of property in his custod
from making such sale directly or indirectly
himself or to a corporation for which he acts
officer or agent. He can not be seller for t
Government or for his trust and buyer for hi
self or for his corporation. This principle
founded upon the recognized limitations of huma
nature. As an officer of the Government or
trustee he owes his first and highest obligati

to his government or his trust, and human nature is so constituted that he can not possibly discharge this obligation if, as to the subject matter thereof, he assumes a directly opposite position as purchaser in his own interest or in the interest of a corporation for which he acts. No question of motive, of good or bad faith, of benefit or injury to the trust enters into it. The rule is absolute. As was said by Justice Story for this Court in *Wormley* v. *Wormley,* 8 Wheat. 421:

> No rule is better settled than that a trustee can not become a purchaser of the trust estate. He can not be at once vendor and vendee. He can not represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as a purchaser to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters.

Again, Justice Wayne in the opinion of this court in the leading case of *Michoud* v. *Girod,* 4 How. 502, stated the basis of the rule as follows:

> In effect he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells.

So, in *Downs* v. *Rickards,* 4 Del. Chanc. 416, the Court well stated the absolute character of the rule as follows:

> The rule is one of the widest application. It applies not only to trustees in the strict technical sense but to all persons holding fiduciary confidential relations, such as assignees in bankruptcy, executors, and administrators, attorneys, and solicitors, and with the greatest stringency to guardians. (Citing authorities.) The prohibition does not depend upon any question of fraud or improper representation made by the purchaser. *However fair the sale and adequate the price, the court will set it aside. In view of the difficulty of unraveling fraud in these transactions, the policy of the rule is to exclude the possibility of it by making the prohibition absolute.* [Italics ours.]

It has been repeatedly held by this Court that transactions by public officers or trustees in violation of this absolute rule of law are void.

> *Wormley* v. *Wormley,* 8 Wheat. 421.
> *Michoud* v. *Girod,* 4 How. 502.
> *Stephen* v. *Beall,* 22 Wall. 329, 340.
> *United States* v. *Carter,* 217 U. S. 286, 308.
> *Magruder* v. *Drury,* 235 U. S. 106, 120.
> *Jackson* v. *Smith,* 254 U. S. 586.

Congress has not been willing to rest the control of officers of the United States solely on this rule or principle of law, however absolute. At an early period in our government statutes were passed embodying this rule in its strictest terms for the regulation and control of public officers in the administration of the government, and imposing

penalties for the violation thereof. The scope of these statutes has been enlarged and extended until they now embrace every branch and activity of the Government.

See Rev. Stats. Sections 243, 244, 452, 2078, 3339, 3168, 3152, 3342, 3741, and 5498; Criminal Code, Sections 41, 109, 114, 115, 123, 124, and 226.

A number of these statutes have been before this Court and they have always been liberally construed to accomplish their obvious purpose. Without exception this Court has held that regardless of any penalties imposed, transactions of public officers in violation of these statutes are void and that no rights as against the United States can be derived therefrom.

Prosser v. *Finn*, 208 U. S. 67.
Waskey v. *Hammer*, 223 U. S. 85.
Ewert v. *Bluejacket*, 259 U. S. 129.

Some of these statutes and cases construing and applying the same will be examined more at length in the discussion which follows. With the principle stated, we shall first bring to the attention of the Court the statute which it is contended by the Government controls this case and the facts to which the provisions of that statute are to be applied.

1. The transactions were void as being in violation of Section 41 of the Criminal Code

At the time the transactions here in question took place, section 41 of the Criminal Code of the

United States, as amended in 1909, was, and still is, in full force and effect. This section reads as follows:

> SEC. 41. *No officer or agent* of any corporation, joint stock company or association, and no member or agent of any firm or *person directly or indirectly interested* in the pecuniary profits or *contracts* of such corporation, joint stock company, association, or firm, shall be employed or *shall act as officer or agent of the United States for the transaction of business with such corporation,* joint stock company, association, or firm. Whoever shall violate the provisions of this section shall be fined not more than $2,000 and imprisoned not more than two years. [Italics ours.]

This section embraces within its terms and applies to *any and all officers or agents* of the United States. The principles of the statute were made specially applicable to the officers and agents dealing with enemy property by rules and regulations promulgated by the Custodian, as he testified, with the approval of the President, in June, 1918, which rules and regulations were in full force and effect at the time the transactions in question took place. (P. Ex. 3, Rec. Vol. 8, p. 14.)

Among the rules so established to govern sale of alien property was the following (P. Ex. 3, R. Vol. 8, p. 21):

> Under no circumstances will *any person in the employ, or connected with* the organ-

ization, of the Alien Property Custodian be permitted to *bid for or purchase any property or be interested directly or indirectly in any such purchase, or in any corporation or syndicate interested therein.* * * * [Italics ours.]

Mr. Garvan testified that he was familiar with these regulations. (Rec. Vol. 5, p. 3085.)

It appears that at the time these sales and assignments were made (with the exception of the last two, which are immaterial) the relations of the parties conducting these transactions for the Government and for The Chemical Foundation, the seller and purchaser, respectively, were as follows:

FOR THE SELLER, THE GOVERNMENT OF THE UNITED STATES	FOR THE PURCHASER, THE CHEMICAL FOUNDATION, INCORPORATED
FRANCIS P. GARVAN, Alien Property Custodian, charged by law with the duty of holding, managing, and disposing of this property and to protect the interests of the people of the United States, and any other person having an actual or contingent interest in the property.	FRANCIS P. GARVAN, president of The Chemical Foundation, Incorporated, and as such charged with the duty to protect the interests of the purchaser, The Chemical Foundation, Incorporated, and to secure said property at the lowest price and on the best terms practicable for the purchaser.
DOUGLAS I. MCKAY, a director appointed by Francis P. Garvan, while Alien Property Custodian, to represent the Custodian and the interests of the United States in various corporations, for	DOUGLAS I. MCKAY, vice president of The Chemical Foundation, and charged with the duty to promote and advance the interests of that corporation in said purchase and to secure said property

which he received compensation in excess of $5,000 per annum.

GEORGE J. CORBETT, an officer and director appointed by Francis P. Garvan while Alien Property Custodian, in various corporations controlled by the custodian, representing the interests of the United States therein, and receiving large compensation therefor.

FRANCIS P. GARVAN, DOUGLAS I. MCKAY, GEORGE J. CORBETT, holding the positions and charged with the duties to the United States just set forth.

JOSEPH H. CHOATE, JR., chief of the Chemical Division, Bureau of Investigation, Alien Property Custodian, in special charge of the investigation of dye and chemical matters, who possessed large information as to these patents, trade-marks, and so forth, obtained exclusively in the course of his official duties, and active in negotiating said sale on behalf of the United States.

at the least price and on the best terms practicable for the purchaser.

GEORGE J. CORBETT, secretary and treasurer of The Chemical Foundation, Incorporated, and as such charged with the duty of protecting the interests of said corporation in said purchase and securing said property at the least price and on the best terms possible for the purchaser.

FRANCIS P. GARVAN, DOUGLAS I. MCKAY, GEORGE J. CORBETT, constituting the board of directors of The Chemical Foundation, Incorporated, and charged with the duty of managing the affairs of said corporation, and authorizing and approving said purchase upon terms most favorable to The Chemical Foundation, Incorporated, and its stockholders.

JOSEPH H. CHOATE, JR., general counsel of The Chemical Foundation, Incorporated, and as such charged with the duty of representing and advancing the interests of said purchaser in the purchase of said patents and other property.

RAMSEY HOGUET, patent attorney for the Alien Property Custodian and advising in matters relating to patents, trade-marks, and so forth, who was active in negotiating said sale on behalf of the United States.

OTTO T. BANNARD, GEORGE L. INGRAHAM, CLEVELAND H. DODGE, BENJAMIN H. GRISWOLD, Jr., RALPH STONE, constituting the Advisory Sales Committee of the Alien Property Custodian, appointed by the President and charged with the duty, as agents of the United States, of determining upon sales of specific property, approving the terms of sale, and the price, seeing that there was a fair sale, and that the purchaser was qualified to purchase.

RAMSEY HOGUET, patent attorney for The Chemical Foundation, Incorporated, charged with the duty of advising said purchaser and aiding said purchaser in securing the patents, trade-marks, and other property on the best terms possible.

OTTO T. BANNARD, GEORGE L. INGRAHAM, CLEVELAND H. DODGE, BENJAMIN H. GRISWOLD, Jr., RALPH STONE, voting trustees of the common stock of The Chemical Foundation, Incorporated, and as such trustees for the stockholders thereof, and in control of said corporation, and charged with the duty of promoting in every legal way the interests of said corporation and the stockholders thereof in the purchase of said properties and otherwise.

The essential facts leading up to these transactions have been stated in the "Statement of Case," *ante*, pp. 8 to 44. It will be recalled that the active steps to obtain a seizure and transfer of these patents and properties began in January, 1919. They were carried on by conferences between Mr. Garvan, Mr. Choate, and Mr. Hoguet, representing the Custodian, and a Committee of the dye and chemical manufacturers. (Rec. Vol. 4, pp. 2603 and 2604; Rec. Vol. 5, pp. 2985 and 2986.) These conferences developed a

plan for the seizure of the patents, etc., and the transfer thereof by private sale to a corporation to be organized, the stock of which was to be, and was afterwards, all owned by members of the dye and chemical industries. The plan had developed to the point that the "price" to be paid by the corporation had been agreed upon, though the parties to this arrangement can not be identified (Rec. Vol. 5, pp. 2986 and 2988); the charter of the corporation had been obtained, but it had not been organized; some 450 in number of patents had been seized, and the first order of February 26, 1919, had been obtained from Mr. Polk.

When that stage in the development of the plan had been reached Mr. Palmer resigned as Custodian on March 4, 1919. On his recommendation Mr. Garvan was appointed in his stead and qualified on that day. (Rec. Vol. 4, p. 2632; Rec. Vol. 5, p. 2995.) When Mr. Garvan thus became Custodian on March 4, 1919, all of the persons named above were members of the staff of the Custodian in the capacities stated except Mr. McKay and Mr. Corbett. They were appointed to the positions named at or about the time they became officers and directors of the Foundation under Mr. Garvan (Rec. Vol. 5, pp. 3032, 3055–3061), which was one month before the first assignment was executed on April 10, 1919.

The official organization of the corporation was consummated on March 8, 1919, four days after

Mr. Garvan became Custodian. On that day Mr. Garvan was elected President, and the other persons named were elected or appointed to the respective positions stated above in the corporate organization. (P. Ex. 56, Rec. Vol. 8, pp. 173–178.) The status of these persons as to the United States and the corporation is thus definitely established by contemporaneous official records. This status continued thereafter, except that some time later, after the principal conveyances had been made, Mr. Choate severed his official connection with the Custodian's office, but continued as General Counsel of the Foundation and counsel for the Dyes Institute, to which latter position he had been appointed during the course of these transactions. (Rec. Vol. 5, pp. 3163 and 3164.)

At the time of the appointment of Mr. Garvan as Custodian on March 4, 1919, and his election as president of the Foundation on March 8, 1919, less than 500 of these patents and other properties had been seized. (Rec. Vol. 1, p. 124.) As to the others, more than 6,000 in all, the owners had not then been determined to be enemies, and no seizure thereof had been made. They were subsequently seized by Mr. Garvan as Custodian while he was also president of the Foundation at various times covering a period of two years, although the greater part thereof, including substantially all of the important patents, were seized by him between March 4, 1919, and April 10, 1919, and

included in the assignment to the Foundatio
made on the later date.

(For dates of seizure see columns marke
"Date of Filing and Recording" of Exhibit G t
Bill of Complaint, Rec. Vol. 1, pp. 124 to 39
For Assignment of April 10, 1919, Rec. Vol. 1, p
124 to 292.)

The Corporation authorized the purchase of th
properties covered by the first assignment at
meeting of the board of directors held on the 4t
day of April, 1919, Mr. Garvan being present an
voting thereon as one of the three members of th
Board. The other two were attached to his staff a
custodian. This is the first evidence of any agree
ment by any identified person to purchase thes
patents. (P. Ex. 58, Rec. Vol. 8, p. 187.)

Mr. Garvan obtained the second order from Mr
Polk on April 5, 1919. (Rec. Vol. 1, p. 554.)

The status of the transaction involved in the
first and principal assignment (which was sub-
stantially the same as to all others except two
immaterial transactions in March, 1921), and the
status of the parties thereto and their relations
to the United States the grantor, and the Foun-
dation the grantee, are thus clearly established
by the records. If there were any doubt it is
set forth in the Answer, which is, of course, bind-
ing on appellee (Rec. Vol. 1, p. 538), as follows:

> Said Garvan was recommended to the
> President by said Palmer for appointment
> as his successor in the office of the Alien

> Property Custodian because said Garvan was familiar with the aforesaid investigations of the chemical industry in the United States and had participated therein and knew the results thereof and was fully informed as to the aforesaid *plan* formulated by said predecessor, Palmer, for the sale of said patents to defendant, and approved the same. Said Garvan thereupon *proceeded to carry into effect said plan of sale as formulated and agreed upon by his predecessor.*" [Italics ours.]

These are the facts. The application of the simple and plain language of Section 41 to these facts can, the Government contends, lead to but one conclusion, and that is that these transactions so conducted were in direct and flagrant violation of the statute and void as against the United States. If this conclusion, which seems obvious, be correct, that ends this case.

In view, however, of the varied arguments made in the Courts below in an effort to meet the situation thus created, and in view of the position of those Courts, a more detailed examination and application of the language of this statute seems necessary.

The statute is in the *disjunctive* and provides that—

(a) No officer, *or*

(b) Agent of *any* corporation, joint-stock company, or association, and

(c) No member, *or*

(d) Agent of *any* firm, *or*

(e) Person directly interested in the pecuniar profit, *or*

(f) Contracts of such corporation, joint-stoc company, association, or firm,

(1) shall be *employed,* or

(2) shall *act* as an officer or agent of the Unite States *for the transaction of business* with suc corporation, etc.

We thus have six distinct classes of persons wh are forbidden to *be employed* or *to act* as officer or agents of the United States in the "*transactio of business*" with the corporation, joint stock com pany, association, or firm with which such person may have *any one* of the six relations stated. I is important to observe that it is not necessary tha *any two* of these conditions should be combined t fall within the prohibition. If a person is a "officer" or "agent" of the corporation he doe not have to have an interest in the "profits" o "contracts." The statute is in the disjunctive an clearly makes the existence of any one of the rela tionships stated sufficient to bring the perso within the absolute prohibition thereof.

Mr. Garvan was, prior to March 4, 1919, chie of the bureau of investigation of the Custodian He was therefore an agent of the United State Mr. Palmer testified that he referred to Mr Garvan the matter of working out some plan fo the transfer of these patents for the use of the in dustry, but was advised of and approved wha

was done. (Rec. Vol. 4, pp. 2599, 2600, 2603, 2604.) Mr. Garvan testified that he conducted the negotiations with the representatives of the industry. (Rec. Vol. 5, pp. 2985 and 2986.) He further testified that he with Mr. Choate and Mr. Hoguet conducted the negotiations at which the "price" was fixed (Rec. Vol. 4, p. 2800), and that about the same time he agreed to become President of the proposed purchasing corporation (Rec. Vol. 5, pp. 2951 and 2952). Mr. Palmer did not appear in these transactions at all until he obtained the order from Mr. Polk on February 26, 1919, and he did nothing further in relation to the carrying out of the proposed plan. He resigned on March 4, 1919. Therefore on their own testimony Mr. Garvan conducted all of the negotiations prior to March 4, 1919, in the development of the plan looking to a transfer of these patents, etc., to the corporation of which he had agreed about the middle of February, 1919, to become president. (Rec. Vol. 5, pp. 2951 and 2952.)

When Mr. Garvan became Custodian he had agreed to become president of the corporation but had not been elected. Mr. Palmer testifies as to his recommendation of Mr. Garvan for Custodian (Rec. Vol. 4, p. 2632):

> My purpose in urging Mr. Garvan's appointment as Alien Property Custodian was quite largely in view of the fact that he had undertaken to be the president of this

> corporation, and I knew he could be abs
> lutely trusted to carry out its plans a
> purposes to the letter.

Thus upon Mr. Palmer's own testimony he re
ommended that Mr. Garvan be "employed"
act for the United States in contemplation of
direct violation of the express language of the sta
ute. Mr. Garvan testified that he did not kno
of the statute. (Rec. Vol. 5, pp. 3084, 3086.)
must be assumed that Mr. Palmer was in the sa
position or he would have advised the Preside
of its provisions.

We are not dealing with the criminal aspects
this statute or charging anyone with crime. T
obvious purpose and effect of the prohibitive pr
visions of this statute is to *incapacitate* any pers
who is an officer or agent of a corporation, et
from "being employed" or "from acting" as
"officer" or "agent" of the United States in t
"transaction of business" with such corporatio
etc.

Mr. Garvan became Custodian on March
1919. From and after March 8, 1919, he w
president and director of the Foundation.
was "employed" and "acted" as an officer a
agent of the United States. As director of t
corporation he voted on the 4th day of Apr
1919 (P. Ex. 58, Rec. Vol. 8, p. 187), for the co
poration to purchase these patents from hims
as Custodian, and pay the purchase price the
for. As Custodian he consummated, or to use t

words of the Answer in this case (Rec. Vol. 1, p. 538) he "proceeded to carry into effect said plan of sale" by causing to be prepared and making the conveyance to and accepting the purchase price from the corporation of which he was president. If this is not the "transaction of business" with the corporation, it would be hard to say what is.

As to the remaining eighteen assignments executed by him, the conditions were exactly the same, except that as to these cases he conducted all negotiations leading up to the transactions as Custodian. Mr. Palmer was then Attorney General and had nothing to do with these "transactions of business."

It is suggested that Mr. Garvan had no "pecuniary" interest in the corporation in that he received no salary as President and owned no stock. This is not denied. He served as President without compensation, and held only qualifying shares of stock without beneficial interest therein. But the statute does not require that an "officer" or "agent" shall have a "pecuniary interest" to bring him within its terms or incapacitate him to act as officer or agent of the United States.

Mr. Choate, while agent of the United States on Mr. Garvan's staff, participated with Mr. Garvan in the negotiations, organized the corporation, and as General Counsel thereof participated in the consummation of the sales. (Rec. Vol. 4, p. 2801; Rec. Vol. 5, p. 3066.) Mr. Hoguet, as Patent Counsel of the Custodian and as such agent of the

United States, also became Patent Counsel of the corporation on March 8, 1919. He prepared or approved the various instruments of assignment executed by the Custodian to the corporation. (Rec. Vol. 5, p. 3129; P. Ex. 58, Rec. Vol. 8, p. 187.) The other parties named were in similar positions, but their respective parts in these transactions were less important. We submit that these transactions are unique in the history of this government and are clearly void as against the United States. This Court has in several cases passed upon transactions of officers or agents of the United States in similar though less aggravated cases, and has without exception held them void.

A leading case on this subject is *Prosser* v. *Finn*, 208 U. S. 67. In that case a man named Prosser was a special agent of the General Land Office, and made an entry upon public lands. There was a statute which provided as follows:

> The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this Section shall forthwith be removed from his office.

Prosser having made the entry while he was special agent of the Land Office, continued in possession after he retired from the service and subsequently a patent was issued to him. The Commissioner of the General Land Office held that the special agent was not within the terms of the

statute, since it only applied to "the officers, clerks, and employees in the General Land Office." A suit was brought by a conflicting claimant for the cancellation of Prosser's patent. The court held the entry to be void and decided that the patent must be cancelled. In reaching this conclusion the court said:

> Being employees in the General Land Office, it is not for the court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employees in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase directly or indirectly of public lands. * * * The prohibition in the existing statute is not restricted to any particular officers or particular employees of the Land Office, but embraces "employees in the General Land Office," without excepting any of them.

In the case of *Waskey* v. *Hammer*, 223 U. S. 85, it appeared that one Whittren in 1903 discovered placer gold on certain land in Alaska and made location of the same under the mining laws. In 1904 he made conveyance of this land to Hammer and others. At the time that the location was made Whittren was an employee of the Land Office within the meaning of Section 452. It was contended that he did not come within the terms of the statute, since he was not "in the Land Office" and only acted at the solicitation of owners of

claims and was paid by the owners and not by the Government. It will be observed that the suit was against Hammer, who claimed under conveyance from Whittren and had nothing to do with the illegal act. Whittren had no interest in the suit. The court held that Hammer *being a claimant under a conveyance from Whittren under a location which was void because of Whittren's connection with the Government, Hammer could have no rights in the property.* In discussing the case the court said at page 93:

> The purpose of the prohibition is to *guard against the temptations and partiality* likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to *prevent abuse and inspire confidence in the administration of the public-land laws.* [Italics ours.]

The court then stated the rule, as follows:

> The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer, but this rule is subject to the qualification that when, upon a survey of the statute, its subject matter, and the mischief sought to be prevented, it appears that the legislature intended otherwise, effect must be given to that intention. *Miller* v. *Ammon,* 145 U. S. 421, 426; *Burck* v. *Taylor,* 152 U. S. 634, 649; *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540, 548. Here we think the general rule applies. The acts described in Sec-

> tion 452 are expressly prohibited under penalty of dismissal. *There is in its language nothing indicating that its scope is to be confined to the exaction of that penalty, Prosser* v. *Finn, supra, or that acts done in violation of it are to be valid against all but the Government.* Nor is there anything in its subject matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable, from the language of the Section and the situation with which it deals, that it is intended that violations of it *shall be attended by the ordinary consequences of unlawful acts.* We therefore are of opinion that the readjusted location was void. [Italics ours.]

It seems to have been admitted that the transaction would have been void as against the Government.

The case of *Ewert* v. *Bluejacket,* 259 U. S. 129, involved the action of a special assistant to the Attorney General in purchasing from an Indian certain allotted lands. Section 2078 of the Revised Statutes provided that:

> No person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for, and on account of, the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office.

After determining that Ewert came within the prohibition of the statute the court stated at page 138:

> The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer. *Waskey* v. *Hammer,* 223 U. S. 85, 94, and cases cited. The qualifications of this rule suggested in the decisions are as inapplicable to this case as they were to the *Waskey case. The mischief sought to be prevented by the statute is grave and it not only prohibits such purchases but it renders the persons making them liable to the penalty of the large fine of $5,000 and removal from office. * * * The purchase by Ewert, being prohibited by the statute, was void.* [Italics ours.]

It is, of course, settled law that transactions by public officers in violation of the Statutes of the United States are void and confer no rights upon anyone as against the United States.

> *Ewert* v. *Bluejacket,* 259 U. S. 129, 138.
>
> *Waskey* v. *Hammer,* 223 U. S. 85, 94.
>
> *United States* v. *San Jacinto Tin Co.,* 125 U. S. 274, 307.
>
> *Pine River, etc., Co.* v. *United States,* 186 U. S. 279, 291.
>
> *United States* v. *Alexander,* 110 U. S. 325.
>
> *Humboldt* v. *Long,* 92 U. S. 642, 648.
>
> *The Floyd Acceptances,* 7 Wall. 666, 677.
>
> *Hunter* v. *United States,* 5 Peters, 173, 186.

It is submitted, therefore, that the transactions in question, being in direct violation of the prohibition contained in Section 41 of the Criminal Code applicable to any and all officers or agents of the United States, were void as against the United States.

2. Contentions of appellee and positions of the Courts below on this point

In the trial court counsel for defendant, when confronted by this statute, devoted much time and ingenious argument to an effort to evade its plain and sweeping provisions. These arguments were chiefly founded upon the contention that the sales were in fact made by Mr. Palmer as Custodian and not by Mr. Garvan. While this would not have cured the illegality of the transactions, it was a rather startling contention in view of the fact that Mr. Palmer ceased to be Custodian on March 4, 1919, and the first of these conveyances was made on April 10, 1919, and the others during the two years following when Mr. Garvan was Custodian and Mr. Palmer was Attorney General, and more particularly in view of the Answer in this case. (Rec. Vol. 1, p. 538.)

We shall first consider the facts. There is no pretense that any agreement was made with anyone for the sale of these properties prior to February 15, 1919, although the matter had been generally discussed. We may, therefore, take this as a starting point. Mr. Palmer testifies that he referred the whole matter to Mr. Garvan in Jan-

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uary, but was kept informed of developments by Mr. Garvan and approved what was done. (Rec. Vol. 4, pp. 2603 and 2604.)

He did not attend any of the conferences and did not appear in the matter of sale at all except in securing the order from Mr. Polk on February 26, 1919. He did nothing more about it until he resigned on March 4, 1919. It follows, therefore, that the alleged agreement, if made prior to Mr. Palmer's resignation, must have been made by Mr. Garvan. There is no record evidence of any agreement. The only testimony on the subject is that of Mr. Garvan. He states that about the 15th or 16th of February, 1919, there was a conference in New York at which he, Mr. Choate, and Mr. Hoguet were present as representatives of the Custodian, and that the price to be paid for the patents, etc., to be assigned was agreed upon as $250,000. That was all. (Rec. Vol. 4, pp. 2799, 2800; Rec. Vol. 5, pp. 3002–3003.) He was carefully examined as to this conference. He could not definitely tell the name of a single person present except the three persons representing the Custodian. He could not tell a thing that was said by anyone. No record was kept or note made of the conference. (Rec. Vol. 5, pp. 2985–2989.)

This is the entire basis for the claim that a contract of sale was made prior to the resignation of Mr. Palmer. At that time very few of the patents had been seized; the corporation which afterwards made the purchase had not even been

chartered; authority to make a private sale had not been obtained, and was not until ten days later. There was, therefore, no authority to sell, nothing to sell, and no purchaser in existence. The persons present at the conference can not be identified, and not a single person or corporation can be named who or which assumed any obligation, present or future, as to any purchase of these patents.

The Court of Appeals, in its opinion on this point, says (Rec. Vol. 7, pp. 5031–2):

> This finding may be challenged on the ground that at the time Mr. Palmer was Alien Property Custodian and the contract was made the Chemical Foundation had not been incorporated and therefore it was not in existence. That is true. But it is familiar business practice for persons to negotiate and fully complete contracts for the benefit of corporations intended to be organized, and, of course, not in existence, and the courts sustain such contracts when later the corporations are organized *and they assume* the contracts. [Italics ours.]

The principle and practice stated is admitted, but the facts are absent. Who entered into a contract "for the benefit" of this corporation? Mr. Garvan was asked and could not name anyone. What were its terms? Nobody knows. When was it made? What was the promise or consideration? Not a single element of contract on the part of any purchaser of these patents appears in the record until the directors of the

corporation, of which Mr. Garvan was one, passed a resolution on the 4th day of April, 1919. (P. Ex. 58, Rec. Vol. 8, p. 187.) To purchase these properties and pay $250,000 therefor; and, although Mr. Garvan was present and voted on the resolution, nothing was said about assuming any preexisting contract. This was as to the first assignment only. The Court ignores all the others.

The answer of the defendant is conclusive on this point. That answer (Rec. Vol. 1, p. 538) avers that Mr. Palmer had "formulated" a "plan of sale" of said patents. Of course a plan by a prospective seller is not a contract to sell or a contract of sale. The answer then states "That said Garvan thereupon proceeded to *carry into effect said plan* of sale as formulated and agreed upon *by his predecessor.*" That ends this discussion so far as appellee is concerned, although this answer was evaded by counsel and ignored by the Courts. Mr. Palmer, acting through Mr. Garvan, "formulated" a "plan." Mr. Garvan after he became Custodian "carried into effect said plan of sale" by (1) organizing a purchaser, (2) securing a second order from Mr. Polk enlarging the alleged power of sale, (3) making a contract of sale wherein he acted both as Custodian for the United States and as president and director of the corporate purchaser, (4) executing the contract of sale by making the conveyance, and (5) receiving the purchase money from the purchaser. This applies to the properties covered by the assign-

ment of April 10, 1919. As to the other eighteen assignments made by Mr. Garvan to the corporation of which he was president in the course of two years, Mr. Palmer clearly had nothing to do with the negotiations or sales. They were negotiated and made by Mr. Garvan as Custodian.

Neither of the Courts below based its decision to the effect that this statute did not apply to the transactions in this case on the positions advanced by counsel which have been discussed, nor did the Courts themselves base their conclusions on the same grounds.

The District Court held that the application of this statute was prevented by a clause in Section 7 (e) of the Trading with the Enemy Act (Rec. Vol. 7, p. 4966), a point suggested for the first time by the Court after the case was submitted.

We submit that there is no conflict or inconsistency between Section 41 of the Code and Section 7 (e) of the Act and no indication that Congress intended that the one should override or limit the general application of the other, but even had this existed, the court should have so construed and applied the two acts as to give effect to both. This will more clearly appear from an examination of the language of Section 7 (e) of the act, the connection in which it is used, and the nature of the transactions here under review.

As we undertook to show in the beginning of the discussion of *Point I*, with reference to the inter-

pretation or construction of the Trading with the Enemy Act, that Act deals with numerous, separate, and distinct questions. The seizure and holding of enemy property was only one phase of the subject matter.

Section 7 of the Act deals exclusively with the seizure or taking possession of enemy property. It has no relation whatever to the administrative acts of the Government or its officers in holding and dealing with that property *after it is seized*, including the sale or conversion into cash, pending the final action of Congress for the disposition thereof. These phases of the matter are dealt with in Section 12, and by Section 6 of the Act requiring the Custodian *to account therefor*. The power of seizure was vested in the President, that of administration and sale in the Custodian.

Section 7, as amended and in force at the time of the transactions referred to, is divided into five subsections, indicated by the letters (a) to (e), inclusive. Subsections (a) to (c), inclusive, provide for the seizure of property by the President, which power he exercised through the Custodian. In effect, these sections provided that any person, firm, or corporation in the possession of property which the President might determine to be the property of an enemy or ally of an enemy, as defined in the act, should, upon demand of the President, pay over or deliver such property, including shares of stock and other similar evidences of property, to the Custodian. This was a summary

proceeding, and the courts have held that these provisions of the statute gave to the President, or to the Custodian exercising this power on his behalf, the right to immediate possession of the property, or the evidence thereof, even though he made a mistake in the determination that the property was that of an enemy or ally of an enemy. It even gave the power to the President to take possession by force, if necessary.

Miller v. *Kaliwerke, etc.,* 283 Fed. 746.
Bank v. *Garvan,* 273 Fed. 43.
Garvan v. *Commercial Trust Co.,* 275 Fed. 841.
Stoehr v. *Wallace,* 269 Fed. 827.

It was found that in some instances where corporations had stock outstanding, the certificates of which were beyond the jurisdiction of the United States, the Custodian could not obtain the certificates of stock which were necessary for him to hold, as evidences of enemy interest in the corporation, to be voted in the administration thereof. To remedy this condition the section was amended by Act of November 4, 1918, requiring corporations and other similar organizations to cancel such outstanding certificates on their books, without surrender thereof, and issue new certificates to the Custodian. This left the corporation with two certificates outstanding, representing the same shares, and it was obviously necessary to afford some protection to the corporation in such circumstances.

These three subsections (a) to (c), inclusiv
thus provided for the summary seizure of th
property, or evidences of property, under orde
of the President, and upon determination that t
owner thereof was an enemy or ally of an enem

Subsection (d) of Section 7 deals with a di
ferent condition. This subsection provides that
not required to pay over, convey, or transfer suc
property, any person not an enemy or ally of a
enemy who holds money or property for the benef
of an enemy or ally of an enemy, or to whom an
obligation or liability to an enemy or ally of a
enemy is presented for payment, "*may, at h
option,* with the consent of the President, pa
convey, transfer, assign, or deliver to the Alie
Property Custodian said money or other propert
under such rules and regulations as the Presider
shall prescribe." [Italics ours.]

We thus have in this statute two methods b
which money or property, or evidences thereo
may come into the possession of the Custodian
(1) By *seizure,* under order of the President, a
provided in Subsections (a), (b), and (c); or (2
By *voluntary delivery* made by the person in pos
session or in control of such property for th
benefit of an enemy or ally of an enemy.

These conditions presented serious dangers t
persons holding property of another in makin
delivery thereof, whether by order of the Presi
dent under Subsections (a), (b), and (c), or vol
untarily under Subsection (d).

While the statute and acts of executive officers, in pursuance thereof, if clearly done within their authority, might afford protection, yet if the acts of an executive officer should ultimately be found to be beyond his authority, the holders of property might in the absence of express statutory provision to the contrary be held liable for making delivery and for any loss resulting therefrom. This was particularly true as to persons who made voluntary deliveries to the Custodian, since they would be acting at their own risk in so doing. The law is well settled that the act done under an order of an executive officer, including the President of the United States, affords no protection to the person who acts in obedience thereto, unless such order was within the authority of the executive officer, and the act done was within the scope of the order. *Little* v. *Barreme*, 2 Cranch, 170.

Subsection (e) was inserted to meet this situation, and the report of the Senate Committee on Commerce, No. 113, August 31, 1917, page 8, contains the following reference to this subsection:

> Section 7 (e) contains provisions giving protection to any *person who may have performed any act in pursuance of an order, rule, or regulation made by the President*, and provides also for acquittances and discharges *to any such person paying or conveying property* to the alien property custodian. [Italics ours.]

The language of Section 7 (e), so far as he
involved, is as follows:

> (e) No person shall be held liable in a
> court for, or in respect to, anything do
> or omitted in pursuance of any order, ru
> or regulation made by the President und
> the authority of this Act.
>
> Any payment, conveyance, transfer, a
> signment, or delivery of money or proper
> made to the Alien Property Custodian he
> under shall be a full acquittance and di
> charge for all purposes of the obligation
> the person making the same to the exte
> of same.

It will be noted that this language, and eve
part thereof, is essential to meet the conditio
presented by the four preceding subsections.

Clause (1) of Subsection (e) exempts from li
bility any person who may deliver property,
otherwise comply with the *order* of the Preside
requiring the delivery of property as provided
Subsections (a), (b), and (c) preceding.

The second clause of Subsection (e) relates e
clusively to persons who *voluntarily* make delive
of money or property to the Custodian, as pr
vided for in Subsection (d) preceding. This
manifest from the language used. Subsection (
authorizes persons therein described to voluntari
"*pay, convey, transfer, assign,* or *deliver* to t
Alien Property Custodian said *money or oth*
property." [Italics ours.] The second clause
Subsection (e) provides that "any *payment, co*

veyance, transfer, assignment, or *delivery* of *money or other property* made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same." [Italics ours.]

The first clause would not protect a person making voluntary payment *without* a Presidential order, and the second clause would not apply to a person who surrendered possession in *response to seizure under Presidential order.* We thus have a logical and reasonable construction of these clauses, giving effect to every word thereof applied to the subject matter in connection with which they are used, and carrying out the obvious purpose and intent thereof to the fullest extent. This meets every rule of construction.

The courts have in a number of cases had Section 7 (e) under consideration and in every case have given it the construction for which we contend.

In the case of *Kahn* v. *Garvan,* 263 Fed. 909, the court refers to the remedy which is given to claimants by Section 9 of the act, particularly with reference to their right of action in the district court within six (6) months after the conclusion of peace. The court states at page 914:

> But Section 9, having created this remedy, concludes with a paragraph which makes all captured property immune from process in any court and thus cuts off any remedy in

rem or in personam. Moreover, as a necessary corollary, Section 7 (e) provides immunity in personam *to any person who shall comply with any demand of the Alien Property Custodian.* The language of the section it is not necessary to give in extenso; *it provides in the most explicit way for the complete protection in every court of the bailee, trustee, agent, obligor, or other person called upon to yield to the Alien Property Custodian's symbolic act of capture.* [Italics ours.]

See also:

Stoehr v. *Wallace*, 269 Fed. 827, 834.

Garvan v. *Marconi Wireless Telegraph Co.*, 275 Fed. 486.

Garvan v. *Commercial Trust Co. of New Jersey*, 275 Fed. 841, 844.

American Exchange National Bank v. *Garvan*, 273 Fed. 43, 47.

Miller v. *Kaliwerke Aschersleben, Aktein-Gesellschaft*, 283 Fed. 746, 757.

But even if we assume (which we do not admit) that Section 7 (e) applied to the Alien Property Custodian and provided immunity for him as against any suit for anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act, still the Custodian would not be entitled to such protection in this transaction, because (1) there was no order, rule, or regulation of the President authorizing these transactions (see pp. 105 to 138 of this brief); (2) such transactions were not in

accordance with the provisions of the orders of Frank L. Polk, purporting to authorize them (see pp. 132 to 138 of this brief; and (3) neither the President nor Mr. Polk had any authority under this Act to issue any orders, rules, or regulations which would authorize these transactions. However, let us go still further, and assume without admitting that the immunity applied to the Custodian, that there were valid and lawful orders by the President authorizing these transactions; that the President had authority under the Act to make such orders, and that these transactions were in accordance with such orders; still such Section will not defeat the right of the Government in this suit. The most that can be claimed with all of these assumptions is that the Alien Property Custodian is protected and that this Section relieves him from official or personal liability. The Government is not seeking in this suit to hold Mr. Garvan liable. The issues are between the Government and the appellee, and the Government seeks to have the appellee return these properties. The appellee did not act in pursuance of any order, rule, or regulation made by the President. It acted upon orders of its board of directors. Even if this section saves Mr. Garvan and his associates from liability (a question not here raised), it certainly can not give to appellee a good title to these properties acquired and held against the United States under acts of its officers in violation of the provisions of an Act of Congress, or confer upon

them capacity to do something forbidden by Act of Congress.

In *Waskey* v. *Hammer*, 223 U. S. 85, this Court, in speaking of a similar but far less comprehensive statute, said that the purpose of the statute was to "guard against temptations and partiality" and to "prevent abuse and inspire confidence in the administration of the public land laws." Again, in *Prosser* v. *Finn*, 208 U. S. 67, this Court said as to a similar statute:

> Congress has said without qualification that employees in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands. * * * The prohibition in the existing statute is not restricted to any particular officers or particular employees of the Land Office, but embraces "employees in the General Land Office" without excepting any of them.

This is even more true of Section 41 of the Code. It embraces all "officers" and "agents" "of any corporation," and prohibits their being "employed" or "acting" as "officers" or "agents" of the United States in the "transaction of business" with such corporation. The language is all inclusive; the prohibition is absolute. The Government asks that the principles stated in the cases cited supra may be applied, and that these transactions may be held to be within the prohibi-

tion of the clear language of the statute, and therefore void as against the United States.

The Court of Appeals, in holding that Section 41 of the Code did not apply to these transactions, approved the position of the District Court, which has been discussed, but did not place its decision on that ground. It went further and inadvertently, of course, rewrote Section 41 of the Code, substituting the conjunctive "and" for the disjunctive "or," both as to the classes of persons within the prohibition of the Statute and their "interest" in the corporation. In its statement of Section 41 the language of the statute is not quoted. It is summarized as follows (Rec. Vol. 7, p. 5031):

> In defining the offense the statute discloses that it has several elements; (*a*) that the offending person shall hold opposite and incompatible positions, in that (*b*) he shall be an officer or agent of the United States and (*c*) at the same time an officer or agent of a corporation engaged in a transaction with the United States, *and* (*d*) *as such* he shall be directly or indirectly interested in the pecuniary profits or contracts of such corporation.

We submit that this is not what Section 41 says at all. As the statute is stated by the Court it would be necessary, in order to bring a person within the prohibition of Section 41 of the Code, that such person should be (1) an officer or agent of the corporation, and (2) "*as such*"

should have a direct or indirect interest in the pecuniary profits or contracts of the corporation. If either element were absent the statute would not apply. This is not the statute as enacted by Congress and then in force. It reads:

> No "*officer* or *agent* of any corporation, joint-stock company, or association, and no member or agent of any firm, *or* person directly or indirectly interested in the pecuniary profits *or* contracts of such corporation, joint-stock company, association, or firm shall, etc.

The essential difference between the statement of the statute by the Court, upon which its decision is predicated, and the language of the statute itself is manifest. The statute is disjunctive. It provides that if a person is an "officer" or "agent" of "any corporation" (nothing more) he is within the prohibition of the statute as to the "transactions of business" between the United States and that corporation. It does not require that he shall, in addition to being an "officer" or "agent," have "as such" or otherwise an interest in the "pecuniary profits or contracts" of the corporation. If, on the other hand, he is in any way, not "*as such,*" "interested directly or indirectly" in the (*a*) "pecuniary profits" or (*b*) "contracts" of the corporation, he does not have to be an "officer" or "agent" thereof to come within the prohibition of the statute. A stockholder having an interest either in the pecuniary

profits or in the contracts of a corporation is as much prohibited from acting as officer or agent of the United States in transactions with the corporation as is an officer or agent of the corporation. The Court not only held, therefore, that the two conditions must exist as distinguished from only one required by the statute, but that the *pecuniary interest* must arise out of his official position, of which there is not a suggestion in the statute. A man might be both president of a corporation, serving without compensation, and owner of three-fourths of its stock, and through that ownership have enormous prospective profits from a government contract, if secured; yet under the decision of the Court he would not be prohibited from acting for the government in making that contract with the corporation, because although he was an officer of the corporation he did not "as such" participate in the profits. This is not only an unwarranted change by the Court in the language of the statute, it is a destruction and in effect a repeal of the statute by interpretation.

The Court then applies the statute so modified and interpreted to this case. It first finds that a contract to sell these patents was made while Mr. Palmer was Custodian, but this alleged contract was *performed* by Mr. Garvan after he became Custodian and while he was president of the corporation. This brings the transaction of this business within the express prohibition of the statute. In finding that a contract was mad-

the court fails to refer to any evidence on which this finding is based. We have seen that Mr. Garvan, who conducted the negotiations, was unable to identify any person with whom any agreement was made prior to March 4, 1919; that at the time Mr. Palmer ceased to be Custodian only a few of the patents had been seized and the corporation had not been organized. In order to make a contract which could be assumed by the corporation when organized, there must have been some one to contract for the purchase, and no person is or could be identified in this evidence. But even if the contract was made to sell something which the Custodian did not have to a purchaser unidentified or not in existence, the Court finds that the contract was *performed* after Mr. Garvan became Custodian and president of the Corporation, by Mr. Garvan and his associates, which is in accord with the answer in this case and brings it within the express terms of Section 41.

The Court holds that as to Mr. Garvan "there was present the element of two official positions and in these positions, it is true, he *carried out* the contract previously made"; but held that the statute did not apply to his case, as he was a "Dollar a Year Man" and received no compensation as president of the corporation, and therefore had no "direct or indirect interest" in the pecuniary profits or contracts of the Foundation. The statute does not require any interest in the profits or

contracts where the person is an officer or agent of the corporation, nor does there appear to be any exception in favor of "Dollar a Year Men."

As to Messrs. McKay and Corbett, it holds that because they were not stockholders there was lacking the element of pecuniary interest in the profits or contracts. The statute does not require "pecuniary interest" where the person is an officer or agent of the corporation, nor does it refer to "pecuniary interest" at all, but to a direct or indirect interest in the "pecuniary profits or contracts." It is difficult to see how the president, vice president, and active manager, and the secretary and treasurer of a corporation can be held not to have any interest in the "pecuniary profits" or in the "contracts" of the corporation of which they are such officers. The law charges them with such an interest.

As to Mr. Choate, the court holds that he was a "Dollar a Year Man" in the service of the Government, but does not refer to the fact that he was an officer and agent of the corporation at the time these transactions took place and received compensation as such. (Rec. Vol. 5, p. 3068.) He comes within the terms of the statute even as stated and interpreted by the court.

As to Mr. Hoguet, it refers to his position at the time the alleged contract was made, but not at the time that it was carried out by Mr. Garvan with his assistance. He was then patent attorney for both the Foundation and the Custodian, and was receiv-

ing compensation in both capacities. (Rec. V
10, pp. 1480, 1557.) He comes within the expr
terms of the statute even as stated and interpre
by the court.

As to the Members of the Advisory Sales C
mittee, they were undoubtedly agents of the Uni
States with respect to this subject matter, and
voting trustees of the corporation holding all of
voting stock it could hardly be said that they did
have a direct or indirect interest in the pecuni
profits or contracts of the corporation.

The spirit and attitude of the learned Co
below in considering this matter could not be l
ter demonstrated than by its language (Rec. V
7, p. 5033) in finally disposing of this point.
says:

> If the ten persons named violated
> cited Criminal Statute, they did it with
> full knowledge and complicity of the ot
> participants—Mr. Palmer, Mr. Polk, Ju
> Gray, and President Wilson.

The Court thus places the Government, in
serting its rights as to title to property agains
private corporation, in the position of preferr
a criminal charge against the men named. T
statement is not warranted by the facts of t
case. The Government is not preferring a cri
nal charge against anyone. It is asserting that
the position which the parties named occupied
the time they were incapacitated by express st
ute from making sales and conveyances of th

properties to this corporation which could confer a valid title or any title against the United States. It is only relying upon the prohibitive aspects of the statute as was done in *Prosser* v. *Finn* and other cases cited, *supra,* and is not dealing with the criminal aspects at all.

Even more unjustifiable is the suggestion as to Mr. Palmer, Mr. Polk, Judge Gray, and President Wilson. Not one of these men had any connection with this corporation or had anything whatever to do with the carrying "into effect" of these transactions; certainly after March 4, 1919, after which date every sale and conveyance here in question was made or "performed" on the finding of the Court itself. No one of them was an "officer" or "agent" of or had any interest whatever in the corporation.

It was claimed in the Courts below that these transactions were validated by the knowledge or approval of the President. This contention is clearly unsound on two grounds—one of law and the other of fact.

If the transactions as carried into effect by these parties occupying the positions stated were prohibited by statute, as the Government contends, they could not be authorized nor given validity by the approval of the President. The President is as much bound by the laws as anyone else, and has not power either to suspend or annul them. For this proposition no authority is required, but a few among many may be cited.

In a book entitled "Our Chief Magistrate an
His Powers," the present Chief Justice of thi
Court says, at pages 139 and 140:

> The grants of executive power are nece
> sarily in general terms in order not to em
> barrass the executive within the field o
> action plainly marked for him, but hi
> jurisdiction must be justified and vindicate
> by affirmative constitutional or statutor
> provisions or *it does not exist.* [Italic
> ours.]

In the great case of *Ex parte Milligan,* 4 Wal
2, 120, this Court, in holding invalid an act o
President Lincoln which he deemed necessary fo
the safety of the nation in a great war crisis, said

> The Constitution of the United States i
> a law for rulers and people, *equally in wa*
> *and in peace,* and covers with the shield of it
> protection all classes of men at all times an
> under all circumstances. No doctrine in
> volving more pernicious consequences wa
> ever invented by the wit of man *than tha*
> *any of its provisions can be suspended dur*
> *ing any of the great exigencies of goverm*
> *ment.* Such a doctrine leads directly t
> anarchy or despotism. [Italics ours.]
>
> See also, *Floyd Acceptances,* 7 Wall. 66
> 676; *United States* v. *Lee,* 106 U. S. 196, 220
> *Kendall* v. *United States,* 12 Peters, 52
> 610.

It follows that even had the President under
taken by express order to have authorized thes
transactions to be done, or had subsequently ur

dertaken to ratify them (and he did neither), when done by persons occupying the positions and relations stated, in the manner in which they were carried into effect, they would have been entirely void as against the United States, as being in violation of the express provisions and prohibitions of an Act of Congress, and for want of capacity in these persons so situated to perform them on behalf of the United States. But the President never undertook to approve the transactions as "carried into effect" (see Answer, Vol. 1, p. 538) by Mr. Garvan and his associates.

There is not a suggestion in the evidence that the President ever had any actual knowledge of these transactions as "carried into effect" by Mr. Garvan and his associates. The President returned to Paris on March 5th, 1919, and all of these sales were carried out after that date.

The order of February 13, 1920 (Rec. Vol. 1, p. 557), is also relied upon in this connection. This order, when sent to the President, was accompanied by no information as to how or in what manner these sales had been or were being conducted. It was strictly limited by its terms to the rights of action and rights to receive royalties therein mentioned. It did not authorize any sales of any of these patents, etc., themselves or the ratification thereof, but limited its application in the clearest language to the rights therein "authorized" to be sold. It certainly did not refer to the relationships of the parties who had effected or were effect-

ing these sales, and there is no evidence that the President had any knowledge of these relationships.

Even had the President been informed as to these transactions and had actually undertaken to authorize these persons to transact this business on behalf of the United States, it could have had no effect as against the express prohibition of the statute, which incapacitated them while officers of the corporation to "transact any business" with that corporation as officers and agents of the United States. Mr. Garvan continued to occupy the dual relationship stated until March 12, 1921, when he ceased to be Custodian, and after these transactions had been performed.

For the reasons stated, it is submitted that the transactions in question as "carried into effect" by Mr. Garvan and his associates named were in direct violation of the prohibitory provisions of Section 41 of the Criminal Code and were therefore void, and conferred no title upon the appellee as against the United States.

3. Said alleged sales and assignments were illegal and void, being in conflict with settled rules and principles of law and equity applicable to such transactions

The relations of the parties at the time that the sale was made have been set forth. Under settled principles of law applicable to such transactions by persons in a fiduciary position or public officers, regardless of statutes and regulations, this transaction, upon this state of facts, is absolutely

void. **The questions of good or bad faith and of adequacy or inadequacy of consideration are entirely immaterial. The law declares and the courts hold such transactions to be void on principles of public policy, on account of the obvious** incapacity of persons to act in conflicting positions and the requirement of the law that a person who accepts and assumes the obligations of a fiduciary position or a public office *owes his first and entire allegiance to that office or trust* and can not occupy a conflicting or adverse position in dealing with that office or trust or the subject matter thereof.

This principle or absolute rule of law has been briefly discussed in the opening pages of the argument on this point. (Ante, pp. 138 to 141.) It is stated and applied to varying states of facts by the following authorities and decisions of this Court among many others which might be cited:

Story Eq. Jurisprudence, 14 Ch. Vol. 3, Sec. 446.

Pomeroy Eq. Jurisprudence, Vol. 1, Sec. 958; Vol. III, Secs. 1077, 1079.

Wormley v. *Wormley,* 8 Wheat. 421.

Michoud v. *Girod,* 4 How. 502.

Stephen v. *Beall,* 22 Wall. 329, 340.

United States v. *Carter,* 217 U. S. 286, 308.

Jackson v. *Smith,* 254 U. S. 586.

Magruder v. *Drury,* 235 U. S. 106, 120.

Downs v. *Richards,* 4 Del. Chy. 416.

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Ex parte Bennett, 10 Vesey, 393.
Morse v. *Royal,* 12 Vesey, 372.

It is suggested in this case that Mr. Garvan, the Custodian, had no financial interest in the purchase, since he claimed to have held no stock in the appellee corporation and accepted no salary as president. The answer is that the interest adverse to the trustee need not be a financial interest, but the principle forbids a trustee to act as seller and buyer or be interested in a transaction both as seller and buyer, whether that be financial or otherwise. He is, in fact, incapacitated in law from acting in both positions. As we have seen, the rule is founded upon the policy of the law which forbids a fiduciary to occupy an adverse position with respect to a transaction in which he is interested as such fiduciary.

Perry on Trusts, vol. 1, sec. 207.
San Diego v. *San Diego, etc., Co.,* 44 Calif. 106.
Wardens of St. James v. *Church of Redeemer,* 45 Barb. (N. Y.) 356.
Matter of M. E. Society v. *Perry,* 51 Hun. (N. Y.) 104.
Aberdeen, etc., Co. v. *Blackie,* 1 McQueen (H. of L.) 461.

Applying these principles to the facts of this case, which have already been briefly outlined, it seems that the conclusion is inevitable that the transactions here involved were void as against the United States.

The record shows that the Custodian seized and had under his control property of the value of more than $500,000,000, exclusive of the property here in controversy. If he could dispose of these valuable patents, trade-marks, copyrights, and other rights in this manner he could have disposed of all of this property in the same manner. He could have organized a corporation consisting of himself and his associates and conveyed to it the entire $500,000,000 worth of property, including some of the most important commercial properties in this country, for nominal considerations, and thus have removed this property from the control of Congress and from the exercise by Congress of the right and power of final disposition reserved in the Act, and then in justification of such transactions he could have stated that he believed it was in the public interest to have this property under the control of himself and associates rather than to have it retained in the control of the United States. A construction of this simple statute creating a sacred trust with a carefully guarded power of sale, which might lead to such results, should not require serious discussion.

We submit that the transactions in question were in clear violation of Section 41 of the Criminal Code of the United States and of the principles of law and equity applicable to such sales, and that the same were void as against the United States.

Point IV

Assuming but not admitting that private sales were lawfully authorized, the sales as made and conducted by the Alien Property Custodian were illegal and void and conferred no title upon the purchaser

This point involves a discussion of the issues raised by assignments of error Nos. VII and VIII (R. Vol. 7, pp. 5052 and 5053).

The consideration of the questions here presented is predicated upon the discussion of the provisions and construction of the Trading with the Enemy Act contained in Point I of this brief, and we ask the Court, therefore, to keep in mind the views there presented and the authorities cited without repetition thereof.

1. The transactions of sale and assignment by the Alien Property Custodian were in violation of the order of Frank L. Polk (alleged to have authorized a private sale) and therefore void

We have already pointed out that the sales or transactions were made by Mr. Garvan after he became custodian in such manner as to entirely destroy the conditions stated by Mr. Polk in his orders; and that to remove any doubt on this subject the principal assignments contained an express provision that the grants were made "without any reservation or qualification whatsoever, whether by reason of anything contained in the charter of The Chemical Foundation, Incorporated, or otherwise." (Rec. Vol. 1, p. 408.) We have discussed this point fully, *ante* pp. 132 to 138, to which discussion the Court is referred.

2. No effort was made to ascertain the value of the property

The rules and regulations made by the Custodian recognized that in the sale of this property the Custodian would be acting for the Government, and that in exercising the powers of a public officer, with power of tax, he would be subject to the limitations imposed by law upon trustees. One fundamental essential of a sale by a trustee or a person occupying a fiduciary position is that it must be a fair sale in every sense of the word, and the property must be sold under such conditions as will enable it to bring its fair equivalent in money.

Wormley v. *Wormley*, 8 Wheat. 421.
Lamar v. *Micoux*, 112 U. S. 452.
Melich v. *Voorhees*, 24 N. J. Eq. 305.
Hill v. *Shoemaker*, 8 D. C. 305.
Hoppes v. *Cheek*, 21 Ark. 585.
Beall v. *Dingman*, 227 Ill. 294.
Perry on Trusts, 5th Ed., Vol. 2, Sec. 770.

With this object in view the rules and regulations required the appraisal and valuation of property, including a complete audit of going concerns covering a period of five years, and other proceedings which would enable the Custodian and prospective purchasers to know what was the fair value of the property; the advisory committee was created to pass upon such value; and those charged with the making of sales were required to see that they were so made that the purchaser would be in-

duced to give that value. (P. Ex. 3, Rec. Vol. 8, pp. 14 to 27.)

In this case none of these proceedings were taken. The income at the rate of about $300,000 per annum then being derived from a few of the patents licensed (P. Exs. 198 and 198A, Rec. Vol. 8, pp. 473–477) does not appear to have been considered. There was some discussion of price at the conference of January 27, 1919 (P. Ex. 28, Rec. Vol. 8, p. 85 at 96 and 97), but the number of patents was not then known and no conclusion was or could then have been reached. (P. Ex. 28, Rec. Vol. 8, p. 85 at pp. 96–99.) There was apparent agreement on the principle that no amount in excess of the actual fees and expenses of issue of a patent, which was estimated at $50 each, should be paid. (P. Ex. 28, Rec. Vol. 8, p. 85 at pp. 96 and 97.) Mr. Palmer testifies that this was the basis of determining the price. (Rec. Vol. 4, p. 2679.) Of course, this method gave no consideration whatever for the property in the patent. Mr. Palmer testifies that he considered the "value to the purchaser" under the terms of sale. (Rec. Vol. 4, p. 2681.) Mr. Garvan testifies that in fixing the price they considered the interests of the industry and the amount of money they were willing to raise. (Rec. Vol. 5, p. 3029.) Mr. Choate says the price was "a guess." (Rec. Vol. 5, pp. 3167, 3170.) The Court of Appeals finds that the price was fixed at an amount which the purchaser was willing to pay. (Rec. Vol. 7, p. 5012.)

It should not be necessary to discuss at length the question of the validity of a sale by a public officer of property in his custody made in this manner.

3. The patents, trade-marks, copyrights, and other similar property covered by these alleged sales or assignments, though taken from many separate owners and held by the Custodian in many separate trusts, were all sold in bulk and not in a manner which would constitute a fair sale

An examination of the list of patents and other rights claimed to have been sold (Record Vol. 1, pp. 124 to 404) will show that these patents and other properties originally belonged to and were seized or captured from thousands of different independent owners; and the record shows that some of those owners were American citizens. (P. Ex. 487, Rec. Vol. 9, pp. 907–922.) They were held in many separate trusts by the custodian, each trust representing a separate owner. The Custodian was required by Section 6 of the statute to account therefor. Many of these patents were sold on the day after or a few days after they were seized. They were sold for one gross price, under each assignment, which the testimony shows was at an approximate average of $40 each. There was no allocation of the purchase price to any patent or group or groups of patents, or to any owner, but it was paid into the Treasury as a lump sum and there so remains. It is now impossible to allocate it among the thousands of owners. The record shows that the regulations of the Custodian required property seized from each owner to be

carried in a separate and distinct trust, and the law would require this to be done in any event. See Amendment July 1, 1918 (40 Stat. 645), providing for payment of taxes out of property of each "enemy." It is contended and we think requires no argument to show that such a sale of trust property is illegal and void.

> *McCullough* v. *McCullough,* 44 N. J. Eq. 313.
>
> *Fowler* v. *Colt,* 25 N. J. Eq. 202.
>
> *Salisbury* v. *Colt,* 27 N. J. Eq. 492.
>
> *Perry on Trusts and Trustees,* Vol. 1, Sec. 463.

4. The sales were invalid because of the combination of substantially all of the prospective purchasers into one organization, which not only stifled competition but absolutely prevented the possibility of any other purchasers

We direct attention to the fact that the regulations controlling the sales issued by the Custodian on June 6th, 1918, expressly provided (P. Ex. 3, Rec. Vol. 8, p. 16):

> It is necessary that every precaution shall be taken to enable properties to be sold fairly and for a proper price, without any possibility of favoritism or undue advantage in favor of any particular purchaser.

This regulation was merely declaratory of the settled law with respect to the sale of public property by a public officer. In *Thatcher* v. *Powell,* 6 Wheaton, 119, Chief Justice Marshall said:

> That no individual purchaser can sell or convey good title to the land of another, unless authorized to do so by express law, is

one of those self-evident propositions to which the mind assents without hesitation, and that the person invested with such power must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court.

In *Cocks* v. *Izard,* 7 Wallace, 559, the Supreme Court said:

> The law will not tolerate any influences likely to prevent competition at a judicial sale, and it accords to every bidder a chance for a fair sale and full price; and if he fails to get these in consequence of the wrongful interference of another party, who has purchased his property at a price greatly disproportionate to its value, equity will step in and afford redress, either by setting aside the proceedings under the sale or by holding the purchaser to account.

See also:

Slater v. *Maxwell,* 6 Wallace, 268.
Smith v. *Ayer,* 101 U. S. 320, 327.
Perry on Trusts, 5th Ed., Vol. 2, Sec. 781.
Ord. v. *Noel,* 5 Madd. 440.
Taylor v. *Tabrum,* 6 Sim. 281.
Connolly v. *Parsons,* 3 Ves. 628.
Mortlock v. *Buller,* 10 Ves. 292, 309.
Johnson v. *Dorsey,* 7 Gill. 269.
Hintze v. *Stingel,* 1 Md. Ch. Dec. 283.
Penny v. *Cook,* 19 Iowa, 538.

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We have already pointed out how the dye and chemical interests were combined in this purchase so as to prevent any possible competitive bid.

P. Ex. 28, Rec. Vol. 8, pp. 85–87.
P. Ex. 29, Rec. Vol. 8, pp. 110–111.
P. Ex. 49, Rec. Vol. 8, p. 155.
P. Ex. 26, Rec. Vol. 8, pp. 81–82.
P. Ex. 34, Rec. Vol. 8, p. 135.

There is no controversy on this point. In his report to Congress, made in February, 1919 (D. Ex. 30, Rec. Vol. 11, p. 2181), Mr. Palmer, then Custodian, says:

> Substantially the entire industry having combined for the purpose of this purchase, it would have been impossible on public sale to find as a bidder any legitimate manufacturer.

In his testimony in this case, Mr. Palmer said (Rec. Vol. 4, p. 2681):

> I had to consider not only the value of the patents generally and the value to the seller, but in view of the fact that I had for the reasons stated created a purchaser for the purpose of making the purchase *I had to consider the value to the purchaser.* [Italics ours.]

A public officer in making a sale of property for the United States gives as his reason for making a private sale the fact that all prospective purchasers were combined with his approval, thus eliminating competitive bidding; and that in arriving at the price he considered the value to the

purchaser! The fundamental evils and illegality of these transactions are clearly illustrated by those two statements.

5. The sales were invalid because purposely made in such a manner as to destroy, in whole or in part, the value thereof

The courts below held that only sales were authorized and that the transactions in question must be sustained as sales. (Rec. Vol. 7, pp. 4914 and 5022.)

In the case of *Nicholls* v. *Peak*, 12 N. J. Eq. 69, the court, in discussing this subject, says:

> If the trustee violates his trust and the purchaser lends his aid and countenance he is not entitled to protection. If the property is sold *not for the purpose of executing the trust but for any other purpose,* and the purchaser knows it, he participates in the fraud and is involved in its consequences. [Italics ours.]

In Pomeroy on Equity Jurisprudence, Vol. III, Sec. 1067, the principle is thus stated:

> The trustee is bound to protect the trust property in every reasonable manner during the continuance of the trust. He must therefore with due diligence obtain possession of the trust property, and must then retain it securely under his own control. He can not divest himself of the trust by conveying or assigning the property away to third persons, unless the trust itself is for the very purpose of a sale or disposition; *and even then he can only dispose of*

> *the property in pursuance of the trust and to carry out its objects.* [Italics ours.]

See also:

> *Melich* v. *Voorhees,* 24 N. J. Eq. 305.
> *Green* v. *Green,* 23 Wall. 486, 490.
> *Union Pacific R. R. Co.* v. *Durant,* 95 U. S. 576.
> *Lamar* v. *Micoux,* 112 U. S. 452, 465.
> *Wormley* v. *Wormley,* 8 Wheat. 421.
> *Wadsworth* v. *Adams,* 138 U. S. 380.

The answer in this case, and especially the third affirmative defense therein stated, seeks to justify this transaction upon the express ground that it tended to promote the interests of the dye and chemical industry of the United States *and was made for that purpose.* (See also testimony of Mr. Garvan, Record Vol. 5, pp. 3092–3.)

In the report of Mr. Palmer, made at the time this sale took place (Def. Ex. 30, R. Vol. 11, p. 2179), he says:

> The idea was accordingly conceived that if the German chemical patents *could be placed in any American institution strong enough to protect them a real obstacle might be opposed to German importation after the war, and at the same time the American industry might be freed from the prohibition enforced by the patents against the manufacture of the most valuable dyestuffs.* [Italics ours.]

He then states that the matter was placed before the leading dye and chemical manufacturers and

met with their enthusiastic approval, and as a result the organization of the appellee and the sale of the patents to the appellee were undertaken.

See also testimony of Mr. Garvan, Rec. Vol. 5, pp. 3092–3093.

The District Court in its opinion (Rec. Vol. 7, p. 4911) says:

> It [the Government] asserts that the conditions of sale were partially destructive of the selling value even to American citizens. This is likewise conceded.

The Circuit Court of Appeals takes the same view. (Rec. Vol. 7, pp. 5039–5042.)

The facts are admitted by appellee in its answer and throughout the record, and the transactions are sought to be justified in law on the ground that they were done in the interest of "American industry." Both Courts below justify them in law on this ground. We find nothing in the statute which makes the Custodian the guardian of the interests of American industry or authorizes him to use the property in his custody to subsidize that industry or any part thereof in his discretion, especially through a corporation of which he happens to be president. An application of the terms of the statute and the most elementary principles of law stated and illustrated in the authorities cited to the facts thus found and admitted should demonstrate the illegality of these transactions as against the United States.

6. The sales were illegal and void on account of the relation of the parties conducting the same to each other and to the subject matter

The consideration of this subheading involves a discussion of the legal effect on these transactions of the admitted facts that the Custodian making the sales as an officer of the Government was at the same time the President of the purchasing corporation, and that the other officers of said corporation and voting trustees for its stock were, at the time said sales were made, also officers and agents of the United States, connected with the office of the Custodian, and charged with the duties relating to these properties and to the sales thereof. It is therefore contended that these sales were void as against the United States, both under the provisions of Section 41 of the Criminal Code and under the rules of law and principles of equity applicable to such transactions.

The issues thus presented have been fully discussed under Point III of this brief (ante, pp. 138 to 185), and the court is referred to that discussion without a repetition thereof at this point.

7. The sales were illegal and void for the reason that the price was grossly inadequate

We have seen that the imperative duty of a fiduciary or public officer clothed with power of sale is, when that power is exercised, to make a fair sale in the interest of his trust. Since a sale is a transfer of property into its fair equivalent in money (*Williamson* v. *Berry*, 8 How. 495, 543), no sale

can be fair which does not substitute what is in law a just equivalent in money for the property transferred. The most elementary and fundamental test of a fair sale is to be found in the manner in which the price is arrived at, and in the measure or adequacy of the consideration.

Benjamin on Sales, Sec. 1.
Williamson v. *Berry,* 8 How. 495, 543.
Five Per Cent Cases, 110 U. S. 475.
Perry on Trusts, 5 Ed., Vol. 2, Sec. 781.
Oliver v. *Court,* 8 Price, 165.
Hill v. *Shoemaker,* 8 Dist. Col. 305.

This principle was especially applicable to sales of property in the custody of the Alien Property Custodian on account of the character of the property, the various relations involved, and the fact that Congress had by express reservation in the Act required the property or its proceeds to be held for final disposition by Congress after the war. An improvident sale for an inadequate consideration would, therefore, mean a sacrifice of the interests of the public, and when Congress came to make final disposition of the property it might involve the honor and good faith of the Government itself. The power of sale given to the Custodian must be read and exercised in the light of other provisions of the Act, recognized principles of law, the circumstances surrounding this property and the contingencies stated.

In the case of *Wormley* v. *Wormley,* 8 Wheat. 421, the Supreme Court, in an opinion by Justice

Story, reviewed this subject, and among other things said:

> But his acts, nevertheless, are subject to the scrutiny of the law; and if that opinion has not been fairly and honestly exercised, if it has been swayed by private interests and selfish objects, if the sale has been made at a price utterly disproportionate to the real value of the property and the evidence demonstrates such facts, a court of equity will not sanction an act that thus becomes a fraud upon innocent parties.

In the case of *Stevens* v. *Austin*, 7 Juris, N. S., 873, the Court of Queen's Bench of Great Britain was called upon to consider this question. In discussing the inadequacy of consideration the Court quoted with approval the following rule as stated by Lord St. Leonard in The Law of Vendors and Purchasers, 13th Ed., page 50:

> Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price and that in the execution of the trusts they will pay equal and fair attention to the interests of all persons concerned.

The rule thus stated is so elementary that we do not deem the citation of additional authorities at this point necessary.

The District Court found that the "price for which the property was sold was far less than the property was worth to the Germans from whom it was seized" and that "the conditions of sale were

partially destructive of the selling value even to American citizens." (Rec. Vol. 7, p. 4911.) How about its value in the hands of the United States!

Upon the question of inadequacy of consideration the Circuit Court of Appeals said:

> If, in looking at it in one way, inadequacy of price means that the $250,000 paid was not enough in that it was less than the value of the patents in the hands of their previous German owners, we promptly say the price was grossly inadequate. (Rec. p. 5039.)

And again it says:

> Difficult as the problem is, we are nevertheless of opinion that $250,000, if paid for the outright unlimited and unconditional purchase of these patents by American citizens at a supposed public sale, would be inadequate, *and we base our conclusion on the royalties which were being paid and received for some of them in 1919.* [Italics ours.] (Rec. p. 5041.)

Under the Charter of the Corporation and the terms of the assignment (Rec. Vol. 1, pp. 90, 408) the purchase was "unlimited and unconditional."

The record shows that there were transferred through the Custodian to the appellee in this case: Patents, 4,764; applications for patents, 288; trade-marks, 874; copyrights, 492; contracts calling for the payment of money for the use of patents, 57; making a total number of properties

sought to be transferred to the purchaser of 6,475. (D. Ex. 92, Rec. Vol. 11, p. 2666.)

The total consideration paid for all of these properties seized from several thousand separate owners was $271,850, or an average consideration of $41.98 each. The average consideration for the patents and other similar properties conveyed by the 19 several instruments of assignment varied from $12.46 each in the assignment of May 15, 1920, to $64.28 each in the assignment of June 21, 1919. The average for the largest assignment, of April 10, 1919, was $21.94 each. A tabulated statement of these sales and the consideration in each case has already been given in the statement of facts and will be found in the record. (D. Ex. 92, Rec. Vol. 11, p. 2666; see *ante*, p. 37.)

The principles of law by which the fair value of property of another taken for public use or sold by the government is to be arrived at are familiar to this Court and need not be discussed. A few of the leading authorities in which these principles are stated and applied are cited for the convenience of the court should it desire to examine them:

Lewis on Eminent Domain, 2 ed., Sec. 478, 479.

Boom Co. v. *Patterson*, 98 U. S. 403.

Simpson v. *Shepherd*, 230 U. S. 451.

United States v. *Chandler, etc., Co.*, 229 U. S. 53, 77.

Boston Chamber of Commerce v. *Boston*, 217 U. S. 189, 195.

Patents or applications therefor and similar rights are properties to be valued in the same manner as other property:

Cammeyer v. *Newton*, 94 U. S. 225.
James v. *Campbell*, 104 U. S. 356.
Seymour v. *Osborne*, 11 Wall. 538.
United States v. *Palmer*, 128 U. S. 262.
Hills v. *Iron Works*, 210 Pac. 17.
Hamilton, etc., v. *Wolf Bros.*, 240 U. S. 251, 259.

Patents are in the nature of franchises and are of the most important elements of value in earning capacity where it is available. Where this is not available all elements must be considered to arrive at the fair value.

Seymour v. *Osborne*, 11 Wall. 538.
Monongahela, etc., Co. v. *U. S.*, 148 U. S. 312, 329.
Hills v. *Iron Co.*, 210 Pac. 17.
Article 843, Reg. 62, U. S. Int. Rev. Act, 1921.
Westinghouse v. *Wagner*, 225 U. S. 604.
Hamilton, etc., Co. v. *Wolf Bros.*, 240 U. S. 251, 261.

Applying these principles and authorities to the facts in this case it will be seen that the witnesses for defendant all testified to the enormous value of these patents, and sought to justify taking them on that ground.

In his Report to Congress, just before these sales were made (D. Ex. 30, Rec. Vol. 11, p. 2125), Mr. Palmer discusses the value of these patents.

After pointing out that the German owners had realized as high as $700,000 a year from importations into the United States under some of these patents, he says (Rec. Vol. 11, p. 2145):

> From the foregoing it will be seen that the all-important portion of the chemical industry, the branch in which the work of the Alien Property Custodian would necessarily be most arduous and in which its results would be most beneficial, was the dye industry. The vital character of that industry was due not to its financial importance, since the consumption of dyes in the United States at the outbreak of the war did not exceed $25,000,000 a year in cost to the consuming industries, nor to the fact that these dyes were absolutely essential to industries producing perhaps $2,500,000,000 of goods annually, but most of all to the fact that the technical skill and equipment provided by a successful dye industry would furnish the means, and almost the sole means, to which every nation must look for advances in the application of chemical science to practical undertakings.

Mr. Garvan also testified before the Congressional committees on this question of value, which testimony was read into this record. He stated that the patents were of "tremendous" commercial value (Rec. Vol. 3, pp. 1434, 1437, 1442).

In a meeting of the stockholders of the Foundation, held December 2, 1919 (P. Ex. 63, Rec. Vol. 8, p. 207), Mr. Hoguet said (p. 236) that the vat

dye patents alone would yield an assurred income of $200,000 a year. These were only a very small proportion of the patents, to say nothing of the other properties.

There are certain elements to be applied to the revenues derived from the use of these patents by appellee peculiar to this case. The claim is made that appellee was not organized for profit (Rec. Vol. 5, pp. 3014 and 3016), but merely to hold these patents, etc., and license the use of the same by American manufacturers and others chiefly members of or stockholders in appellee. It is obvious, therefore, that appellee did not undertake to derive the largest practical return from these properties (Rec. Vol. 5, p. 3016), but to so use the same as to give to the licensees thereof, chiefly its stockholders, the largest benefit which could be derived by them, only taking from such licensees such royalties as might be desired for the conduct of the business of appellee. The District Court refused to permit inquiry into this profit (Rec. Vol. 6, p. 4125), and the Court of Appeals approved this ruling (Rec. Vol. 7, p. 5043).

The actual revenues derived from these patents under such conditions only tends to show the minimum, not the actual value thereof.

By reference to plaintiff's Exhibit 199 (Rec. Vol. 8, pp. 479 and 480) and the testimony in connection therewith (Rec. Vol. 3, p. 1476, and following), it will be seen that after making every allowance in favor of the appellee and every de-

duction which the appellee could claim, the actual revenues derived from the patents licensed by the Federal Trade Commission under these licenses at the low rate of 5% royalty stated, and the contracts held by the Custodian, to June 30, 1919 (which was the date agreed upon as representing the period prior to the sale), an average of less than one year from the date of the licenses was as follows:

From licenses of the Federal Trade Commission	$169,606.88
From contracts held by the Custodian	122,758.04
Total for period	$292,364.92

This income for one year was rapidly increasing. The patents had an average of eight years to run. (Rec., Vol. 1, pp. 124–355.)

In addition to the revenues derived under licenses issued by the Federal Trade Commission, which continued subsequent to the sale, amounting from date of sale to December 31, 1922, to $321,964.50 (P. Ex. 199, Rec. Vol. 8, p. 479), which The Foundation now claims as its property; the Foundation itself derived, under its own licenses, from the date of purchase of the patents to December 31, 1922, $672,888.43 (P. Ex. 199, Rec. Vol. 8, p. 479), making a total of revenues derived from patents and trade-marks subsequent to the date of sale of $994,852.93 (P. Ex. 199, Rec. Vol. 8, p. 479). This was for a period of three and a half years, or an average of $284,243.70 a year of actual revenues from a comparatively small number of patents and trade-marks, so licensed. It

will be recalled that the gross amount paid for all these 6,475 patents, trade-marks, and other rights was $271,850 (D. Ex. 92, R. Vol. 11, p. 2666); so that the average revenues derived from the few patents then licensed each year from the date of purchase to December 31, 1922, was $12,393.70 in excess of the actual gross consideration for all, or a return of 104.5 per cent on the investment each year.

It follows that if the Foundation was entitled, as it clearly thought it was, to receive the revenues accrued *to the date of sale under the patents then licensed*, and the revenues *subsequent to the sale* which it now claims, a large proportion of which it has collected and spent, it would have received or been entitled to receive up to December 31, 1922, three and a half years after the purchase, the gross sum of $1,287,217.85 (Exhibit Book, p. 479), which is $1,015,367.85 in excess of the entire consideration paid for these patents and other rights. If this transaction is sustained, therefore, appellee, on this theory, would, on December 31, 1922, be in the position of having received back its original purchase price and been paid 373½ per cent profit and still own approximately 6,000 of the most valuable patents, trade-marks and copyrights, then in the United States, which still had an average of approximately five years yet to run.

The corporation was not organized for profit. How much did the licensees, its stockholders,

make? The court below did not permit the Government to inquire. (Rec. Vol. 6, p. 4125.)

It should be noted in this connection that at the very time that the first sale was consummated, and for several weeks prior thereto, the officers of appellee, including the Custodian, had been greatly agitated over the proposed importation of *reparation dyes* from the occupied territory of Germany by the Government itself. (P. Ex. 569, Rec. Vol. 9, p. 1352.) At the time that this sale took place the importation of those dyes had been determined upon and the officers of appellee strenuously endeavored to have that corporation appointed agents for the importation thereof. (P. Ex. 583, Rec. Vol. 9, p. 1370; P. Ex. 585, Rec. Vol. 9, p. 1373.)

This having failed, appellee by virtue of its alleged ownership of the dye patents included in the first sale of April 10, 1919, levied a 10 per cent royalty on the importation of those dyes *owned by the United States,* which royalty aggregated, in round figures, $215,000. (Rec. Vol. 2, pp. 989 to 994.)

The total cost of administering these patents by the Federal Trade Commission, including the cost of checking up the licenses, had been about $5,000 a year. (Rec. Vol. 3, p. 1646.) The Foundation did not check its licenses. (Rec. Vol. 5, pp. 3134 and 3569.) Substantially the entire revenue was net. The real profit from the use of the patents went to the licensees, the largest of which were stockholders of the Foundation. The court would

not permit the Government to go into this aspect of the matter. The real value of the patents could not therefore be shown. (Rec. Vol. 6, p. 4125.)

It is also contended that the German patents involved in this case did not have the value claimed because of absence of full disclosure and want of "know how." Much evidence was taken on this point. This was obviously all afterthought devised for defense. The answer is that on the evidence of the parties themselves the patents controlled important parts of the dye and chemical industry (Rec. Vol. 6, p. 4077); that they controlled importations of these products (D. Ex. 30, Rec. Vol. 11, p. 2179); that these products were in fact in every instance being manufactured and sold under these patents, under licenses issued by the Trade Commission before these transfers and afterwards by the Foundation (P. Exs. 216–335, Rec. Vol. 8, pp. 515–682; P. Exs. 198–198A, Rec. Vol. 8, pp. 473–477; Rec. Vol. 6, p. 4262; Rec. Vol. 6, p. 4024; Rec. Vol. 5, p. 3346), and all of this is confirmed by the anxiety of these parties to get them (P. Ex. 28, p. 85; P. Ex. 29, p. 110; P. Ex. 30, p. 118; P. Ex. 33, p. 123; all in Rec. Vol. 8). In view of this record, this contention made for the first time in this case hardly merits serious discussion.

In conclusion of this point, it is to be observed—

(1) That these properties were in the poss
sion of the United States with full power to
or license the same.

(2) That many of the most valuable of th
patents had been recently granted and that t
all had an average of eight years to run. (R
Vol. 1, pp. 124–355.)

(3) That they controlled to a large degree
dye and chemical industry, including impo
and exports of the products covered thereby.
Ex. 30, Rec. Vol. 11, pp. 2179, 2180.)

(4) That some 126 of the principal pate
had already been licensed by the Trade Comm
sion and were yielding a revenue at the rate
about $300,000 a year. (P. Exs. 198 and 19
Rec. Vol. 8, pp. 473–477.)

(5) That the Foundation continued some
these licenses and issued others, and althou
granting low licenses and not checking the lic
sees it continued to realize more than $300,00
year therefrom. (P. Ex. 199, Rec. Vol. 8,
479 and 480.)

(6) That the consideration paid was less t
the cost of issue of the patents, and admitte
represented nothing for the property value there
(D. Ex. 92, Rec. Vol. 11, p. 2666; See ante, p. 3

(7) That the Courts below both held that
consideration paid did not represent the value
the property, but the transactions as made
stroyed the "monetary value" for purposes
sale. (Rec. Vol. 7, pp. 4911, 5039, 5041.) Yet

Courts below held that the orders of Mr. Polk only authorized sales, and that these transactions were sales and must be sustained if at all as sales. (Rec. Vol. 7, pp. 4914 and 5022.)

We submit that as sales they can not be sustained under the statutes of the United States or principles of law applicable thereto; that they violated every known rule of law as to sales by an officer of the United States of property in his custody; and that these transactions in form of sales are void and conferred no title upon the purchaser.

Point V

The transactions of alleged sales and assignments of the patents and other properties involved in this suit were illegal and void in that the same were induced, brought about, and accomplished in pursuance and as a result of an unlawful scheme or conspiracy

This point involves Assignment of Error X. (Rec. Vol. 7, p. 5054.)

A conspiracy has been defined as—

> A combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. (*Pettibone* v. *United States,* 148 U. S. 203.)

It is claimed that the transactions in question were brought about and accomplished in pursuance and as a result of a scheme or conspiracy to secure and effect a transfer of these properties from the United States to defendant corporation,

without substantial consideration, in a manner and by proceedings which were in violation of the laws of the United States; and that this was done with the purpose and effect of combining in the hands of this corporation all of the enemy-owned patents relating to these industries and controlling domestic manufacture and sale as well as imports and exports of these products, and thus creating in the purchasers a combination and monopoly which was in violation of the statutes of the United States.

The more essential facts leading up to these transactions are stated in their order in the "Statement of Case" (ante, pp. 8 to 44), and need not be repeated. It is the contention of the Government that these facts as disclosed by contemporaneous records and the testimony of the parties establish a scheme entered into by and between Mr. Garvan and his associates, representing the Custodian, and certain members of the dye and chemical industries carrying on these negotiations to bring about a transfer in form of sale of these patents and other properties of great value for no substantial consideration from the United States to a private corporation of which Mr. Garvan and his associates were to be officers and which was to be owned by the members of the industry, and that this scheme was carried into effect in the manner which has been fully stated after Mr. Garvan became Custodian and president of the purchasing corporation.

It is contended that in conception and execution this was a scheme or conspiracy to transfer or to secure a transfer of this property from the Government in violation of the terms and intent of the Trading with the Enemy Act, Section 41 of the Criminal Code and other laws of the United States, which have been discussed, and that no title to these properties could be vested in the grantee corporation through or as a result of these transactions which could be valid as against the United States.

The Government further contends that this scheme was conceived and carried into effect for an illegal purpose. This purpose was to consolidate all of these patents and other properties controlling the manufacture and sale of the products covered thereby, and the importation and exportation of these products into the hands of this single corporation with unrestricted power in the board of directors thereof to " refuse to issue any license or revoke any license granted by the corporation, and prescribe the terms and conditions of said licenses " in its discretion. The purpose and effect of this arrangement was to vest in this corporation full power to monopolize and to control and restrain the dye and chemical trade, including exports and imports of the United States.

This purpose is fully disclosed in the contemporaneous records hereinbefore recited leading up to these sales. It is definitely stated in the report of Mr. Palmer (Def. Ex. 30, Rec. Vol. 11,

pp. 2179, 2180); it is stated in the minutes and correspondence of the Dyes Institute (P. Ex. 30, Rec. Vol. 8, pp. 118, 121; Vol. 9, pp. 1426, 1444, 1446); it is disclosed in the charter of the Foundation (Rec. Vol. 1, p. 91); it is stated in the form of license issued by the Foundation, which expressly forbade the licensees to import these products into or export them from the United States, or to use any such products made outside of the United States (P. Exs. 168, 168-a, Rec. Vol. 8, p. 403, at 408); it is disclosed in the prospectus of the Foundation, which expressly states its purpose to prevent importations into the United States "from any source whatever" (Rec. Vol. 1, p. 581).

The Act of July 2, 1890 (26 Stat. 209), provides that—

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal.

See also Act of August 27, 1894 (28 Stat. 57), as amended by Act of February 12, 1913 (37 Stat. 667).

It was admitted on the record that these products were moving in interstate commerce (Rec. Vol. 5, pp. 3510 and 3511) and the records cited show that they were the subject of commerce with foreign nations.

While every patent confers a monopoly as to the product covered thereby, this court has frequently held that a combination of patents covering or substantially controlling any essential product of interstate or foreign commerce, into the control of one corporation, or any agreement to secure that end, is a violation of the Anti-Trust laws of the United States and void.

> *Standard, etc., Co.* v. *United States,* 226 U. S. 20, 49.
>
> *Montague & Co.* v. *Lowry,* 193 U. S. 38.
>
> *Straus* v. *American Pub. Assn.*, 231 U. S. 222, 234.
>
> *Blount Mfg. Co.* v. *Yale, etc., Co.,* 166 Fed. 555, 562.
>
> *National Harrow Company* v. *Hench et al.,* 83 Fed. 36, 38.

All of this was brushed aside in the Courts below apparently on the ground that these parties were actuated by good motives and were seeking to promote the interests of the dye and chemical industries of the United States. We are not discussing motives beyond applying the principle stated that the law conclusively presumes that men intend the natural and probable consequences of their acts, or where their purposes, as in this case, are expressed in contemporaneous records. But this Court has disposed of the question of good motives in a number of similar cases.

In *Standard, etc., Co.* v. *United States,* 226 U. S. 20, 49, this Court said:

> Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of this policy with the good intention of the parties.

In *Thomsen* v. *Cayser*, 243 U. S. 66, 86, the Court in disposing of this argument said:

> We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of the defendants.

For the reasons stated it is submitted that the transactions in question were induced, brought about, and consummated in pursuance of a scheme or conspiracy which was in act, purpose, and effect in violation of law; that the same were void and conferred no valid title upon this corporation as against the United States.

Point VI

The court erred in the taxing of the costs against the United States

This point involves directly the consideration of assignment of error XVIII. (Rec. Vol. 7, p. 5056.) The final decree entered by the District Court in this suit contained the following paragraph:

> That the Chemical Foundation, Incorporated, defendant, do recover from the United States of America, plaintiff, the

> moneys advanced by the defendant under the orders of the Court herein entered May 7, A. D. 1923, and July 23, A. D. 1923, for fees in taking testimony and expenses in printing the record in pursuance of said orders, the amounts thereof to be taxed by the Clerk as costs in this cause. (Rec. Vol. 7, p. 4968.)

On May 7, 1923, the District Court appointed one Wm. F. Smart as—

> official stenographer in this cause to take down such testimony and furnish a transcript or transcripts thereof, his fee for taking such testimony and furnishing a transcript thereof to the court to be ultimately taxed as a part of the costs in this cause. The expense of taking a deposition and furnishing a transcript or transcripts thereof shall be advanced by the party calling the witness. (Rec. Vol. 7, p. 4909.)

On July 23, 1923, the court ordered that the entire record in this cause be prepared and printed as reported, including the statement of counsel at the opening of and during the trial. The same order provided that—

> And it is further ordered by the court, counsel of record for the parties consenting in this behalf, that the expense of printing 100 copies of said transcript shall be advanced from time to time and borne in equal amounts by the plaintiff and defend-

> ant and form part of the taxable costs of said cause; the cost of additional copies, if any, which may be furnished to the parties, respectively, shall be borne by the party or parties receiving such additional copies. (Rec. Vol. 7, p. 4910.)

The Government contends and submits that the District Court had no authority to appoint an official reporter and require the United States of America to pay any part thereof.

But the District Court in addition to this ordered the cost of the printing of a hundred copies of the record to be taxed as costs and by the final order has undertaken to require the United States of America to pay to the appellee herein the proportion of such costs which appellee has expended. The Government contends that such an order or decree constitutes error.

The Circuit Court of Appeals, without discussion, sustained the judgment of the District Court. (Rec. Vol. 7, p. 5044.)

The Supreme Court of the United States in the case of *Pine River Logging Co.* v. *U. S.*, 186 U. S. 279, at 296, says:

> While the rule is well settled that costs can not be taxed against the United States, the rule is believed to be universal in civil cases, at least, that the United States recover the same costs as if it were a private individual.

To the same effect see:

U. S. v. *North American Co.*, 253 U. S. 330, 336.

Stanley v. *Schwalby*, 162 U. S. 255, at 272.

Reeside v. *Walker*, 11 Howard, 271, 289.

U. S. v. *McLemore*, 4 Howard, 286, 288.

CONCLUSION

In the presentation and discussion of this case in the Courts below every effort was made to put the Government in the position of making charges reflecting personally upon the former officers or agents of the Government who were directly or indirectly connected with the transactions under review. This effort finds some reflection in the opinions of these Courts where it is suggested that by taking the position as a matter of law that these transactions of sale as actually done by the parties thereto were in violation of the prohibitive provisions of the statutes, the Government was charging these parties, even the President himself, with improper acts or with crime.

Nothing is further from the facts as we see them or from the intentions of the Government. The Government in this equity suit against a private corporation is relying upon the prohibitive provisions of the statutes to show that these transactions were unlawful and void. It is not discussing the criminal aspects of the statutes nor charging anyone with crime.

The respectful presentation of these questions of power and of law is no more a reflection upon

the President or other officers mentioned than was the presentation of the questions raised and decided by this Court in *Martin* v. *Mott* a reflection upon President Washington; or in *Brown* v. *United States*, 8 Cranch, 110, a reflection upon President Madison; or in *Ex parte Milligan* or *United States* v. *Lee* a reflection upon President Lincoln; or the numerous decisions of this Court holding Acts of Congress invalid reflections upon the integrity and good faith of that body. The record clearly shows that the President was in Paris when the greater part of these transactions took place and could have had no direct connection with any of them.

Mr. Polk's sole connection with these transactions was the signing of the orders of February 26, 1919, and April 5, 1919, as prepared by the Custodian, one being signed in Washington and the other at White Sulphur Springs.

Mr. Palmer's only act under review in this case was in having prepared and procuring the signature of Mr. Polk to the order of February 26, 1919. He assumes responsibility for the negotiations which were conducted prior to March 4, 1919, and says that he was informed of what was going on; but he clearly took no part therein, and his information was derived from others.

As to the other officers or agents of the Government who were connected with these transactions, their acts have been considered in the light of the law and of the conclusive presumption of law that they intended the natural and probable conse-

quences of these acts. Their motives have not been considered further than through the application of this principle, or as stated by them.

The Government of the United States is an impersonal agency of the people charged with the high duty of enforcing the law and protecting the rights and interests of the people of the United States to the extent that they are committed to its care. In the discharge of this duty it knows no persons and refrains from personalities. The source of its existence and, in this regard, its sole rule of conduct and measure of duty is the law.

It is the imperative duty of the Legal Department of the Government, with prejudice toward none and courtesy toward all, but unrestrained by any false sense of delicacy, to bring these questions, involving the rights and obligations of the Government as an agency of the people, in an orderly manner before this court for consideration and decision. It can not do more, and it certainly should not do less.

This view can not better be expressed than in the language of the then Attorney General of the United States, in closing his oral argument in this case, before the Circuit Court of Appeals, in which he said:

> I have no apologies to make for continuing this case which was brought by my predecessor. * * * I certainly would be very remiss in my duty, in the light of these transactions, if I did not ask the Court to

return that property into the custody
the United States. It will be a dark da
for this Republic when public official
charged with public duties and respons
bilities, can do the acts disclosed by th
record without any consequences to the
and those who claim under them. It woul
be a sadder day if the Attorney General
the United States, in the face of this recor
did not present the matter in court and as
for relief for the United States.

For the reasons herein stated and discussed,
is respectfully submitted that the decisions of th
learned Courts below in this case are erroneou
that they should be reversed and the final orde
therein should be set aside; and that this ca
should be remanded with instructions to grant
the United States the relief prayed in the Bil
and for such other proceedings as may be appr
priate.

WILLIAM D. MITCHELL,
Solicitor General of the United States.
HERMAN J. GALLOWAY,
Assistant Attorney General.
HENRY W. ANDERSON,
Special Assistant to the Attorney General.
NOVEMBER, 1925.

APPENDIX

CRIMINAL CODE

SEC. 41. No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provisions of this section shall be fined not more than two thousand dollars and imprisoned not more than two years.

JUDICIAL CODE

SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

SEC. 241. In any case in which the judgment or decree of the circuit court of appeals is not

made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs. (36 Stat. L. 1157.)

THE TRADING WITH THE ENEMY ACT AND AMENDMENTS.

ACT OF OCTOBER 6, 1917.

[PUBLIC—No. 91—65TH CONGRESS.]

[H. R. 4960.]

AN ACT To define, regulate, and punish trading with the enemy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Trading with the enemy Act."

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or

municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he

shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

* * * * *

SEC. 5. (a) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out

the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.

If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him.

(b) That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States; and he may require any such person engaged in any such transaction to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed.

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official

to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided,* That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided further,* That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

SEC. 7. (a) That every corporation incorporated within the United States, and every unincorporated association, or company, or trustee, or trustees within the United States, issuing shares or certificates representing beneficial interests, shall,

under such rules and regulations as the President may prescribe and, within sixty days after the passage of this Act, and at such other times thereafter as the President may require, transmit to the alien property custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with which the United States is at war, or resident within the territory, or a subject or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest.

The President may also require a similar list to be transmitted of all stock or shares owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy, or in which any such person had any interest; and he may also require a list to be transmitted of all cases in which said corporation, association, company, or trustee has reasonable cause to believe that the stock or shares on February third, nineteen hundred and seventeen, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another: *Provided, however,* That the name of any such officer, director, or stockholder shall be stricken permanently or temporarily from such list by the alien property custodian when he

shall be satisfied that he is not such enemy or ally of enemy.

Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the alien-property custodian by written statement under oath containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen: *Provided,* That the name of any person shall be stricken from the said report by the alien-property custodian, either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy. The President may extend the time for filing the lists or reports required by this section for an additional period not exceeding ninety days.

(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knovingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall,

on conviction thereof, be deemed to violate section three hereof: *Provided,* That nothing in this Act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by an enemy or ally of enemy where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and no enemy or ally of enemy will be benefited by such carrying out, completion, or performance otherwise than by release from obligation thereunder.

Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: *Provided,* That such payment shall not be made without the license of the President, general or special, as provided in this Act.

Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: *Provided, however,* That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so

far as the same arises solely out of the busine transacted within the United States under suc license and so long as such license remains in fu force and effect: *And provided further,* That a enemy or ally of enemy may defend by counse any suit in equity or action at law which may b brought against him.

Receipt of notice from the President to th effect that he has reasonable ground to believ that any person is an enemy or ally of enemy sha be prima facie defense to any one receiving th same, in any suit or action at law or in equit brought or maintained, or to any right or set-of or recoupment asserted by, such person and base on failure to complete or perform since the be ginning of the war any contract or other obliga tion. In any prosecution under section sixtee hereof, proof of receipt of notice from the Presi dent to the effect that he has reasonable cause t believe that any person is an enemy or ally o enemy shall be prima facie evidence that th person receiving such notice has reasonable caus to believe such other person to be an enemy o ally of enemy within the meaning of section thre hereof.

(c) If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder which the President after investigation shall de termine is so owing or so belongs or is so held shall be conveyed, transferred, assigned, delivered or paid over to the alien property custodian.

(d) If not required to pay, convey, transfer, assign, or deliver under the provisions of subsection (c) hereof, any person not an enemy or ally of enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy not holding a license granted by the President hereunder, any money or other property, or to whom any obligation or form of liability to such enemy or ally of enemy is presented for payment, may, at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the alien property custodian said money or other property under such rules and regulations as the President shall prescribe.

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally

of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee. The President shall issue to every person so appointed a certificate of the appointment and authority of such person, and such certificate shall be received in evidence in all courts within the United States. Whenever any such certificate of authority shall be offered to any registrar, clerk, or other recording officer, Federal or otherwise, within the United States, such officer shall record the same in like manner as a power of attorney, and such record or a duly certified copy thereof shall be received in evidence in all courts of the United States or other courts within the United States.

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SEC. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner

of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment

or conveyance, transfer, assignment, or deliver by the defendant or by the alien property cus todian or Treasurer of the United States on orde of the court, or until final judgment or decree shal be entered against the claimant, or suit otherwis terminated.

Except as herein provided, the money or othe property conveyed, transferred, assigned, deliv ered, or paid to the alien property custodian shal not be liable to lien, attachment, garnishment trustee process, or execution, or subject to an order or decree of any court.

This section shall not apply, however, to mone paid to the alien property custodian under sectio ten hereof.

SEC. 10. That nothing contained in this Ac shall be held to make unlawful any of the follow ing Acts:

(a) An enemy, or ally of enemy, may file an prosecute in the United States an application fo letters patent, or for registration of trade-mark print, label, or copyright, and may pay any fee therefor in accordance with and as required b the provisions of existing law and fees for attor neys or agents for filing and prosecuting such ap plications. Any such enemy, or ally of enemy who is unable during war, or within six month thereafter, on account of conditions arising ou of war, to file any such application, or to pay an official fee, or to take any action required by law within the period prescribed by law, may b granted an extension of nine months beyond th expiration of said period, provided the nation o which the said applicant is a citizen, subject, o corporation shall extend substantially simila

privileges to citizens and corporations of the United States.

(b) Any citizen of the United States, or any corporation organized within the United States, may, when duly authorized by the President, pay to an enemy or ally of enemy any tax, annuity, or fee which may be required by the laws of such enemy or ally of enemy nation in relation to patents and trade-marks, prints, labels, and copyrights; and any such citizen or corporation may file and prosecute an application for letters patent or for registration of trade-mark, print, label, or copyright in the country of an enemy, or of an ally of enemy after first submitting such application to the President and receiving license so to file and prosecute, and to pay the fees required by law and customary agents' fees, the maximum amount of which in each case shall be subject to the control of the President.

(c) Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufac-

ture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label or copyrighted matter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding $100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof.

(d) The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to the licensee as established by

the President; and sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (f) of this section, or upon the direction of the alien property custodian.

(e) Unless surrendered or terminated as provided in this Act, any license granted hereunder shall continue during the term fixed in the license or in the absence of any such limitation during the term of the patent, trade-mark, print, label, or copyright registration under which it is granted. Upon violation by the licensee of any of the provisions of this Act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him.

(f) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter: *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided*

further, That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable.

(g) Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: *Provided*, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts.

(h) All powers of attorney heretofore or hereafter granted by an enemy or ally of enemy to any person within the United States, in so far as they may be requisite to the performance of acts authorized in subsections (a) and (g) of this section, shall be valid.

(i) Whenever the publication of an invention by the granting of a patent may, in the opinion of the President, be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the end of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner of Patents that, in violation of said order, said invention has been published or that an application for a patent therefor has been filed in any other country, by the inventor or his as-

signs or legal representatives, without the consent or approval of the commissioner or under a license of the President.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the President above referred to shall tender his invention to the Government of the United States for its use, he shall, if he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government.

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SEC. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or

depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end

that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treas-

urer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further*, That the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

AMENDMENT OF MARCH 28, 1918.

EXTRACT FROM PUBLIC NO. 109, 65TH CONGRESS.

ALIEN PROPERTY CUSTODIAN.

For expenses of the Alien Property Custodian authorized by the Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October sixth, nineteen hundred and seventeen, including personal and other services and rental of quarters in the District of Columbia and elsewhere, per diem allowances in lieu of subsistence not exceeding $4, traveling expenses, printing and binding, and necessary supplies and equipment, $225,000.

The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line

Terminal and Navigation Company, two corpor
tions of the State of New Jersey, if he shall dee
it necessary for the national security and defens
Provided, That if such property can not be pr
cured by purchase, then the President is autho
ized and empowered to take over for the Unit
States the immediate possession and title there
If any such property shall be taken over as afor
said, the United States shall make just compens
tion therefor to be determined by the Presider
Upon the taking over of said property by t
President, as aforesaid, the title to all such pro
erty so taken over shall immediately vest in t
United States: *Provided further*, That sectio
three hundred and fifty-five of the Revised Sta
utes of the United States shall not apply to a
expenditures herein or hereafter authorized
connection with the property acquired.

The fourth paragraph of section twelve of t
"Trading with the enemy Act," approved O
tober sixth, nineteen hundred and seventeen,
amended to read as follows:

"The alien property custodian shall be veste
with all of the powers of a common-law truste
in respect of all property, other than money, whic
has been or shall be, or which has been or shall b
required to be, conveyed, transferred, assigned, de
livered, or paid over to him in pursuance of th
provisions of this Act, and, in addition theret
acting under the supervision and direction of th
President, and under such rules and regulation
as the President shall prescribe, shall have powe
to manage such property and do any act or thing
in respect thereof or make any disposition thereo
or of any part thereof, by sale or otherwise, an

exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates

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which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

Approved, March 28, 1918.

AMENDMENT OF NOVEMBER 4, 1918.

EXTRACT FROM PUBLIC NO. 233, 65TH CONGRESS.

ALIEN PROPERTY CUSTODIAN.

Subsection (c) of section seven of the "Trading with the enemy Act," approved October 6, 1917, is amended to read as follows:

"(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, reg-

istered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person ha
ing any claim to any money or other proper
heretofore or hereafter conveyed, transferred, a
signed, delivered, or paid over to the Alien Pro
erty Custodian, or required so to be, or seized
him shall be that provided by the terms of th
Act, and in the event of sale or other dispositi
of such property by the Alien Property Custodia
shall be limited to and enforced against the n
proceeds received therefrom and held by t
Alien Property Custodian or by the Treasurer
the United States."

Approved Nov. 4, 1918.

Amendment of December 21, 1921

[Public—No. 115—67th Congress]

[S. 2780]

AN ACT To amend section 9 of an Act entitled "An Act to defi
regulate, and punish trading with the enemy, and for other pu
poses," approved October 6, 1917, as amended.

*Be it enacted by the Senate and House of Re
resentatives of the United States of America
Congress assembled,* That section 9 of the A
entitled "An Act to define, regulate, and punis
trading with the enemy, and for other purposes,
approved October 6, 1917, as amended, is hereb
amended by striking out the words "six months
in such section and inserting in lieu there
"eighteen months."

Approved, December 21, 1921.

AMENDMENT OF MARCH 4, 1923.

[PUBLIC—No. 536—67TH CONGRESS.]

[H. R. 14222.]

AN ACT To amend the Trading with the Enemy Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 9 of the "Trading with the Enemy Act," as amended, is amended to read as follows:

"SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the

prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

"(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

"(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city; or

"(2) A woman who, at the time of her marriage, was a subject or citizen of a nation which has remained neutral in the war, or of a nation which was associated with the United States in the prosecution of said war, and who, prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917; or

"(3) A woman who at the time of her marriage was a citizen of the United States, and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman, either

directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917; or who was a daughter of a resident citizen of the United States and herself a resident or former resident thereof, or the minor daughter or daughters of such woman, she being deceased; or

"(4) A citizen or subject of Germany or Austria or Hungary or Austria-Hungary and was at the time of the severance of diplomatic relations between the United States and such nations, respectively, accredited to the United States as a diplomatic or consular officer of any such nation, or the wife or minor child of such officer, and that the money or other property concerned was within the territory of the United States by reason of the service of such officer in such capacity; or

"(5) A citizen or subject of Germany or Austria-Hungary, who by virtue of the provisions of sections 4067, 4068, 4069, and 4070 of the Revised Statutes, and of the proclamations and regulations thereunder, was transferred, after arrest, into the custody of the War Department of the United States for detention during the war and is at the time of the return of his money or other property hereunder living within the United States; or

"(6) A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary

and is so owned at the time of the return of its money or other property hereunder; or

"(7) The Government of Bulgaria or Turkey, or any political or municipal subdivision thereof; or

"(8) The Government of Germany or Austria or Hungary or Austria-Hungary, and that the money or other property concerned was the diplomatic or consular property of such Government; or

"(9) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or who is not a citizen or subject of any nation, State, or free city, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of $10,000, or although exceeding in value the sum of $10,000 is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: *Provided*, That an individual shall not be entitled, under this paragraph, to the return of any money or other property owned by a partnership, association, unincorporated body of individuals, or corporation at the time it was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him hereunder; or

"(10) A partnership, association, other unincorporated body of individuals, or corporation, and that it is not otherwise entitled to the return of its money or other property, or any part thereof, under this section, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value

the sum of $10,000, or although exceeding in value the sum of $10,000, is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: *Provided,* That no insurance partnership, association, or corporation, against which any claim or claims may be filed by any citizen of the United States with the Alien Property Custodian within sixty days after the time this paragraph takes effect, whether such claim appears to be barred by the statute of limitations or not, shall be entitled to avail itself of the provisions of this paragraph until such claim or claims are satisfied; or

"(11) A partnership, association, or other unincorporated body of individuals, having its principal place of business within any country other than Germany, Austria, Hungary, or Austria-Hungary, or a corporation, organized or incorporated within any country other than Germany, Austria, Hungary, or Austria-Hungary, and that the control of, or more than 50 per centum of the interests or voting power in, any such partnership, association, other unincorporated body of individuals, or corporation, was at such time, and is at the time of the return of any money or other property, vested in citizens or subjects of nations, States, or free cities other than Germany, Austria, Hungary, or Austria-Hungary: *Provided, however,* That this subsection shall not affect any rights which any citizen or subject may have under paragraph (1) of this subsection;

"Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Prop-

erty Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian: *Provided,* That no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary, (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be concluded in pursuance of the treaties of peace aforesaid between any nation, State, or free city (of the one part) whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part). For the purposes of this section any citizen or subject of a State or free city which at the time of the proposed return of money or other property of such citizen or subject hereunder forms a part of the territory of

any one of the following nations: Germany, Austria, or Hungary, shall be deemed to be a citizen or subject of such nation. And the receipt of the said owner or of the person by whom said money or other property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said money or other property, or compensation or damages arising from the capture of such money or other property by the President or the Alien Property Custodian: *Provided further, however,* That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

"(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

"(d) Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then his legal representative may proceed for the return of such money or other property as provided in subsection (a) hereof: *Provided, however,* That the President or the court, as the case may be, before granting such relief shall impose such conditions by way of security or otherwise, as the President or the court, respectively, shall deem sufficient to insure that such legal representative will redeliver to the Alien Property Custodian such portion of the money or other property so received by him as shall be distributable to any person not eligible as a claimant under subsections (a) or (c) hereof.

"(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.

"(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

"(g) The legal representative (duly appointed by a court in the United States) of a person, deceased, whose money or other property has been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, may (if not entitled to proceed under subsection (d) of this section) proceed under subsection (a) for the recovery of any interest, right, or title in any such money or other property which has, by reason of the death of such person, become the interest, right, or title of a citizen of the United States, unless such citizenship was acquired through naturalization proceedings in which the declaration of intention was filed after November 11, 1918. Such legal representative shall give a bond, in a penal sum and with sureties satisfactory to the President or the court, as the case may be, conditioned that he will redeliver to the Alien Property Custodian all such money or other property not distributed to such citizen, or, if deceased, to his heirs or legal representatives.

"(h) The aggregate value of the money or other property returned under paragraphs (9) and (10) of subdivision (b) to any one person irrespective of the number of trusts involved shall in no case exceed $10,000.

"(i) For the purposes of paragraphs (9) and (10) of subsection (b) of this section accumulated net income, dividends, interest, annuities and other earnings, shall be considered as part of the principal.

"(j) Subsection (g) and paragraphs (9) and (10) of subsection (b) of this section shall not ap

ply to any patent, trade-mark, print, label, copyright, or right therein or claim thereto, conveyed, transferred, assigned, or delivered to the Alien Property Custodian, or seized by him, or to the proceeds received from the sale, license, or other disposition of any such patent, trade-mark, print, label, copyright, or right therein or claim thereto; but the Alien Property Custodian is authorized and directed to return to the person entitled thereto, whether or not an enemy or ally of enemy and regardless of the value, any patent, trade-mark, print, label, copyright, or right therein or claim thereto, which has been conveyed, transferred, assigned, or delivered to the Alien Property Custodian, or seized by him, and which (1) has not been sold, licensed, or otherwise disposed of under the provisions of this Act, and (2) is not involved (at the time this subsection takes effect) in litigation in which the United States, or any agency thereof, is a party.

"(k) This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof."

SEC. 2. That the "Trading with the Enemy Act," as amended, is amended by adding thereto the following sections:

"SEC. 20. That no money or other property shall be paid, conveyed, transferred, assigned, or delivered under this Act to any agent, attorney, or representative of any person entitled thereto, unless satisfactory evidence is furnished the President or the court, as the case may be, that the fee of such agent, attorney, or representative for services in connection therewith does not exceed 3 per centum of the value of such money or other

property; but nothing in this section shall be construed as fixing such fees at 3 per centum of the value of such money or other property, such 3 per centum being fixed only as the maximum fee that may be allowed or accepted for such services. Any person accepting any fee in excess of such 3 per centum shall, upon conviction thereof, be punished as provided in section 16 hereof.

"SEC. 21. That the claim of any naturalized American citizen under the provisions of this Act shall not be denied on the ground of any presumption of expatriation which has arisen against him, under the second sentence of section 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907, if he shall give satisfactory evidence to the President, or the court, as the case may be, of his uninterrupted loyalty to the United States during his absence, and that he has returned to the United States, or that he, although desiring to return, has been prevented from so returning by circumstances beyond his control.

"SEC. 22. No person shall be entitled to the return of any property or money under the provisions of this Act who is a fugitive from justice from the United States or any State or Territory thereof or the District of Columbia.

"SEC. 23. The Alien Property Custodian is directed to pay to the person entitled thereto, from and after the time this section takes effect, the net income, dividend, interest, annuity, or other earnings, accruing and collected thereafter, on any property or money held in trust for such person by the Alien Property Custodian or by the Treasurer of the United States for the account of

the Alien Property Custodian, under such rules and regulations as the President may prescribe; but no person shall be paid, under this section, any amount in excess of $10,000 per annum.

"SEC. 24. The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act."

Approved, March 4, 1923.

THE FEDERAL ANTITRUST LAW.

[Act of July 2, 1890 (26 Stat., 209).]

AN ACT To protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared

to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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